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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 912

JAMES R. HOFFA, LARRY CAMPBELL, THOMAS EWING PARKS, and EWING KING,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on September 14, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 382 F. 2d 856, and is printed as Appendix A, *infra*. The opinion of the Court of Appeals in denying the petition for rehearing is printed herein as Appendix B, *infra*. Opinions of the District Court are printed respectively as Appendix C and Appendix D, *infra*.

JURISDICTION.

The judgments of the Court of Appeals (Appendix E, *infra*) were entered on September 14, 1967. A timely petition for rehearing was denied on October 16, 1967

(Appendix B, *infra*). On November 2, 1967, Mr. Justice Stewart extended the time for filing of the petition for a writ of certiorari to December 15, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I. Whether petitioners are entitled to a new trial where it is shown by affidavits submitted by them on a motion for new trial based on newly discovered evidence that two jurors failed to disclose on voir dire examination that they entertained a bias and prejudice against one of petitioners, and had prior to trial expressed their intention to convict said petitioner.

II. Whether petitioners are entitled to a hearing on their motion for new trial based on newly discovered evidence, supported by affidavits alleging that certain jurors had prior to trial made extra-judicial statements evidencing their prejudice toward one of petitioners and their intention to convict him; that marshal and jurors engaged in improper conduct and discussions during the trial; and that the trial court during the trial had expressed a personal bias against said petitioner.

III. Whether petitioners, having filed a motion for new trial based on newly discovered evidence alleging misconduct of the marshals and jurors during the trial, and alleging that the Court had during the trial expressed a bias and prejudice against one of petitioners, are entitled to a disqualification of the trial judge, and to have said motion for new trial considered and determined by another judge, particularly after the Court has denied that it had expressed such bias and prejudice.

a. Whether a motion for disqualification of a trial Judge under Section 144, Title 28, United States Code, must be predicated on matters which occurred prior to the trial.

b. Whether a petitioner's post-trial motion for disqualification of a trial Judge under Section 144, Title 28, United States Code, must be accompanied by a good faith certificate of the local attorney who had represented him at the trial, but had withdrawn prior to the filing of said motion, where it was accompanied by a certificate of said petitioner's other trial counsel and by a certificate of a co-defendant's local trial attorney who entered his appearance post-trial as attorney for said petitioner.

STATUTES AND RULE INVOLVED.

Section 144, Title 28, U. S. C., provides as follows:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exist, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Section 455, Title 28, U. S. C., provides as follows:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or con-

nected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Rule 33, Federal Rules of Criminal Procedure, provides in pertinent part:

"... A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the Court may grant the motion only on remand of the case ..."

STATEMENT.

Nature of the Action.

On March 4, 1964, petitioners were convicted on an indictment charging endeavors to influence petit jurors in the earlier trial of the case of **United State v. James R. Hoffa and Commercial Carriers, Inc.** This Court on December 12, 1966 affirmed said convictions, 385 U. S. 293. Petitioners are presently incarcerated under the sentences imposed on said convictions.

On September 1, 1965 petitioners filed in the District Court a motion for a new trial on the ground of newly discovered evidence, alleging that certain jurors and marshals were guilty of improper conduct during the trial, and that the Court and certain jurors were prejudiced against petitioner Hoffa, and that by reason thereof petitioners had been denied their constitutional guarantee to trial by an impartial jury and their rights to due process of law under the Fifth and Sixth Amendments of the United States Constitution (App. 7a-89a; 94a-98a).[1]

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[1] "App." references are to petitioners' joint appendix which was filed in the Court of Appeals.

The District Court denied the motion for a new trial and the request for a hearing thereon (App. 257a-267a, 272a), and also denied petitioners' motions to disqualify the trial court from determining said motion for new trial (App. 117a-127a; 272a). The Court of Appeals for the Sixth Circuit affirmed (Appendix A, *infra*).

The Allegations of the Motion for New Trial.

1. The motion for new trial alleged that shortly prior to September 1, 1965, the date of the filing of the motion, petitioners learned for the first time that certain jurors had failed to disclose on voir dire examination that they harbored a prejudice against the petitioner Hoffa and that they intended to convict him. All prospective jurors had been asked on voir dire examination whether they had any sympathy for or prejudice against any party to the suit, whether they had expressed any opinion about the guilt or innocence of the petitioners, whether they had discussed the trial with anyone and whether they knew of any reason why they could not give both sides a fair trial (App. 73a, 59a-89a, 85a-87a, 60a-65a). Yet, the motion for new trial alleged, and affidavits attached to the motion asserted that juror Kilgore had stated to a fellow employee a few days before the commencement of the trial that if he could get on the jury he would "hang" petitioner Hoffa and would see that he "got what was coming to him". The juror had stated that "Hoffa is guilty as far as I am concerned" (App. 46a). After the trial the juror confirmed his prior prejudice against petitioner Hoffa and told a fellow employee that he had done his part to convict said petitioner Hoffa and that it "was worth it", and that he had meant what he had earlier stated, that he was going to convict (App. 47a).

The motion and supporting affidavits further asserted that juror Starnes prior to the trial told his fellow em-

ployees that if he got on the jury he would convict petitioner Hoffa and that said petitioner was "guilty of about anything they accused him of" (App. 40a-41a). To another co-employee, said juror stated prior to the trial that petitioner Hoffa was "no good and should be convicted and if he was on a jury trying him he would convict him" (App. 42a).

Both of said jurors had given no indication on voir dire examination that they could not give petitioners a fair trial or that they were prejudiced against them (App. 60a-65a, 73a).

In response to these allegations of the motion for new trial, the government filed affidavits of jurors Kilgore and Starnes denying the statements attributed to them (App. 156a-159a; 165a-167a).

2. The motion for new trial with attached affidavits further alleged that although the jurors were ordered to be sequestered at a hotel during the trial and had been instructed not to discuss the case with others or among themselves (App. 88a-89a), nevertheless certain jurors during the trial made statements to third persons that the jury had already made up its mind to convict petitioner Hoffa, that although he had not been convicted before, the jury would see to it that he got what was coming to him, that the male jurors had already decided to convict and that the lady jurors would "go along" with such decision (App. 13a-26a, 28a-31a). Among the affidavits filed in support of the charge that the jurors had already decided to convict was the affidavit of one Marie Monday. It was also alleged that the marshal in charge of the jurors made prejudicial remarks with reference to the guilt of petitioner Hoffa, stating that Hoffa would be convicted one way or another, and that he would be put where he belonged (App. 26a, 19a).

It was further alleged that during the trial marshals attached to the sequestered jury, with the assistance of certain bellboys, furnished certain of the male jurors with prostitutes. Affidavits of Patsy Jo Harris and Bobbie Ann Sells, admitted prostitutes, asserted that during the trial they had engaged in sexual relations with seven designated jurors (App. 14a-15a, 23a).[2] It was further alleged that certain jurors attended parties with marshals away from the hotel, were intoxicated, and acted in an unbecoming manner (App. 17a-21a, 22a, 29a-31a).

The government filed counter-affidavits of the marshals in attendance to the jury, and of all but one of the jurors, denying substantially the charges set out in the motion for new trial (App. 138a-257a).

3. The motion for new trial also asserted that the trial Judge was biased and prejudiced against petitioners, because the Court had made remarks outside of Court, indicating an intention to convict petitioner Hoffa, and that said prejudice denied petitioners a fair and impartial trial (App. 9a-10a). Said allegation was based on the affidavit of the said Marie Monday (App. 32a-33a).[3]

Petitioners further asserted that they had acted with due diligence in attempting to obtain such evidence, but

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[2] Catherine Johnson, also known as Patsy Jo Harris, was on August 30, 1967 convicted in the District Court on a charge of perjury committed before a federal grand jury by reason of her testimony that she had engaged in sexual intercourse with several of the jurors. Said conviction is now pending on appeal.

Patricia Ann Essex, also known as Bobbie Ann Sells, has been convicted under the Juvenile Act in the District Court on a charge of obstruction of justice, by reason of her causing to be filed the affidavit referred to above, but the Court has not yet entered judgment on said conviction.

[3] On April 21, 1967, in a pre-trial conference related to a separate motion for new trial filed by petitioners on the issue of government wiretapping, government counsel represented that said Marie Monday had recanted her said affidavit.

that they were unable to obtain the same prior to the date of the execution of the affidavits in question (App. 11a, 49a-56a). Petitioners requested a hearing on their motion (App. 11a), but the District Court ruled the motion for new trial on the affidavits and counter-affidavits, and denied a hearing (App. 257a-267a). The Court held that petitioners had not shown due diligence in attempting to obtain the "newly discovered evidence" at an earlier date (App. 262a-264a). The Court also made findings that none of the jurors had made prejudicial statements against any petitioner, that no juror failed to give truthful answers on voir dire examination, and that none of the marshals or jurors engaged in any improper conduct during the trial. (App. 264a-266a).

The Denial of the Requests for Disqualification of the Trial Court.

As stated, one of the allegations in the motion for new trial was that the petitioners had been denied a fair trial by reason of the bias of the trial Court, in view of the Court's statements during the trial of its intention to convict petitioner Hoffa. Simultaneously with the filing of the motion for new trial, petitioner Hoffa filed an affidavit of disqualification of the trial Court under Section 144, Title 28, U. S. C. (89a-93a). Attached to the application was the affidavit of said Marie Monday, in which it was alleged that during the trial the District Court had met said Monday and had told her that "Hoffa was going to get what was coming to him this time and that he was going to see to it that he did"; and that on a subsequent occasion, while the trial was still in progress, the court stated that Hoffa was "going to be convicted" because he (the Court) was "in charge of it" (App. 91a).[4] The

[4] See footnote 3, *supra*.

other petitioners also filed affidavits of disqualification of the trial Court, based on said affidavit (App. 98a-104a).

The petitioners' affidavits for disqualification of the court were accompanied respectively by certificates of good faith by counsel of record (App. 90a, 98a-104a). Petitioner Hoffa's affidavit was supported by the certificate of his then counsel of record, James E. Haggerty, Sr., of the Michigan Bar and Harold E. Brown, a member of the Bar of the District Court below (App. 90a). Petitioner Hoffa's counsel at the trial were said Haggerty and one Harry Berke. Berke had withdrawn as counsel shortly after the verdict below, and Brown, who had represented petitioner King during the trial, requested that he be entered as local counsel for the petitioner Hoffa when said affidavit of disqualification was filed (App. 2a).

The District Court on the motion of the government entered an order striking the affidavit for disqualification, on the grounds that petitioner Hoffa had filed a prior affidavit of disqualification as to an earlier Judge, that the affidavits for disqualification were not timely filed, that petitioner Hoffa's affidavit was not accompanied by a proper certificate of good faith executed by counsel of record, and that as to the petitioners other than Hoffa, their affidavits for disqualification alleged bias and prejudice only as to petitioner Hoffa, and that the other petitioners could not have been prejudiced thereby (App. 117a-127a). In its opinion denying said affidavit for disqualification, the District Court stated that he did not know the affiant Monday, had never been introduced to her, had never had conversation with her, had not made the statements attributed to the Court by her, and that her affidavit was "patent perjury" (App. 117a, 118a, 127a).

Subsequent to said ruling by the Court, and before the Court decided the motion for new trial, petitioners filed motions for disqualification under Section 455, Title 28,

U. S. C. (App. 133a-138a) in which motions it was prayed that the Court disqualify itself on the ground that the Court by virtue of statements made in its opinion denying the earlier affidavits of disqualification had predetermined and prejudged allegations of the motion for new trial, had labelled a prospective witness as a perjurer and that by reason thereof the court had a substantial interest in the cause, and had already determined facts which were in issue in the pending motion for new trial, and that the Court could not thereafter rule on said motion impartially. The Court denied said motion for disqualification (App. 272a).

The Court of Appeals affirmed the District Court's ruling, denying the applications for disqualification of the court. The Court held that under the statute relating to affidavits of personal bias and prejudice of the Court such affidavits must be based on facts preceding the trial, not those occurring during the trial; that due diligence had not been shown in the obtaining of the affidavit attached to the application for disqualification; that the affidavit was equivocal; that the affidavit for disqualification did not contain a proper certificate of counsel, since the "statute is not satisfied by having another lawyer, who did not represent the defendant during the trial, execute the certificate"; and that petitioner Hoffa had filed an earlier such affidavit as to another Judge.

The Court of Appeals also affirmed the denial of the motion to disqualify under Section 455, ruling that the trial Court was neither a material witness nor did it have a "pecuniary" interest in the case.

The Court of Appeals also approved the denial of the motion for new trial on the ground that the Court's findings were supported by substantial evidence, that the allegations of the motion for new trial were not shown

to be newly discovered, and that due diligence in obtaining such information was not shown. A majority of the Court of Appeals held the trial Court could properly without a hearing determine the allegations of the motion based on the affidavits and counter-affidavits.

The dissenting opinion of Judge O'Sullivan stated that petitioners were entitled to a hearing on the issues of juror and marshal misconduct raised by the motion and the opposing affidavits, since the trial Court could not without a hearing properly determine issues related to events and acts alleged to have occurred outside of the court's presence.

REASONS FOR GRANTING THE WRIT.

I. Deprivation of Fair Trial—by Jurors' Failure to Disclose on Voir Dire Examination Their Pre-Existing Bias and Prejudice Against One of Petitioners and Their Intention to Convict Said Petitioner.

There is presented for decision here the question of whether a conviction can be permitted to stand where it is first discovered after trial that prior to trial certain jurors had expressed to others a prejudice and bias against a defendant and an intention to convict said defendant, if they became jurors. This question involves the constitutional right of petitioners to be tried by an impartial jury, including the right to obtain on voir dire examination relevant facts from the prospective jurors in order to enable petitioners intelligently to challenge veniremen.

In affirming the denial of the motion for new trial, the Court of Appeals concluded merely that petitioners had not shown due diligence in obtaining evidence of the jurors' bias and prejudice, and that the trial Court's findings were supported by "substantial evidence and are not clearly erroneous" (Op. 12, 13).

The latter pretermits the issue, for the District Court denied petitioners' request for a hearing, and ruled the motion on the affidavits only. As to due diligence, we point out, infra, pp. 21, 22, the impropriety of the trial Court's ruling thereon under the circumstances of this case.

But the question here involved is far too important in the orderly administration of justice to be so lightly brushed aside. Further, the court's ruling conflicts with applicable decisional law ruling that a new trial should be ordered where a juror conceals a material fact which, if disclosed, would likely have induced defense counsel to strike the juror. **Carpenter v. United States**, 100 F. 2d 716 (D. C. Cir.); **United States ex rel. DeVita v. McCorkle**, 248 F. 2d 1 (3 Cir.); **Photostat Corp. v. Ball**, 338 F. 2d 783 (10 Cir.).

There is no question here but that jurors Kilgore and Starnes, on their voir dire examination, expressly denied that they had any prejudice against any party to the suit, that they had any opinion as to the guilt or innocence of any defendant, and that they had previously expressed such an opinion (App. 60a-65a, 73a). Indeed, they also denied that they had discussed the case with anyone prior to their being summoned as prospective jurors. Further, the Court during the voir dire examination, in their presence, excused members of the panel who indicated that they had formed an opinion in the case (App. 59a-89a). Affidavits filed in support of petitioners' motion for a new trial unequivocally asserted that juror Kilgore, a few days before the trial, had told a fellow employee that if he got on the jury he would "hang" defendant Hoffa and see that Hoffa got what was coming to him; and that juror Kilgore prior to trial stated that "Hoffa is guilty as far as I am concerned", and after the trial stated, "I told you he was guilty and I meant what I said before when I said that I was going to get him, and I did my part, and it was worth it" (App. 46a-48a).

The affidavits attached to petitioners' motion for new trial further unequivocally asserted that juror Starnes had repeatedly revealed to his fellow employees that he disliked all unions; and a few days prior to the trial told his co-employees that if he got on the jury he would convict petitioner Hoffa because he should be convicted, that petitioner Hoffa was "no good and should be convicted and if he was on a jury trying him he would be convicted", and that petitioner Hoffa was guilty of "about anything they accused him of". Affidavits of three fellow employees of juror Starnes attested to the foregoing facts (App. 39a-42a).

Thus, this is not an instance where a hearing would only have produced evidence from which the Court could merely speculate as to whether a juror may have formed a prior opinion and concealed such fact. The facts asserted in the affidavits clearly show that two of the jurors who returned the verdict in this cause had an abiding and pre-existing prejudice against at least one petitioner, and a pre-existing determination to convict him before a word of evidence was presented.

The Court of Appeals for the Third Circuit has ruled that due process compelled a new trial for a defendant convicted in state court of murder committed in connection with an armed robbery, where it was learned after trial that one juror had failed to disclose on voir dire that he had previously been the victim of an armed robbery. **United States ex rel. DeVita v. McCorkle**, 248 F. 2d 1. It was held that the failure to disclose such material information served to defeat counsel's "right of challenge", and thereby the accused was deprived of a fair trial. If the failure of a venireman to disclose his prior connection with a totally unrelated crime be sufficient to warrant a new trial, *a fortiori* a new trial is necessary where a juror fails to disclose a hostility toward a defendant and a predisposition to convict him.

Nor do the jurors' protestations of impartiality on voir dire examination eradicate the inherent prejudice. In this respect the lower court's decision is incompatible with this Court's decision in **Irvin v. Dowd**, 366 U. S. 717, where it was held that due process of law requires that a juror should not be permitted to serve if by reason of intensive pretrial publicity the juror had formed a positive impression about the case which prevents him from considering the evidence clearly and impartially.

To permit an accused to have his liberty determined by a jury composed in part of persons hostile and already decided to convict is to remove from the judicial proceeding all semblance of due process of law. Review by this Court of a conviction thus obtained and a new trial denied without a hearing seems particularly appropriate.

II. The Denial of a Hearing on Petitioners' Motion for New Trial.

Although petitioners in their motion for new trial requested a hearing on the issues raised by their motion and affidavits (App. 11a), the trial Court chose to rule the motion for new trial on the Government's counter-affidavits, and denied the motion without a hearing (App. 257a-267a).

The majority decision of the Court of Appeals affirmed such denial of hearing, stating that "[i]t has long been settled that the District Court may hear a motion for a new trial on newly discovered evidence and decide it on affidavits". The dissent was of the opinion that a hearing should have been granted on the opposing affidavits of the parties relating to all allegations of the motion except the alleged bias of the trial Court.

The holding of the Court of Appeals, affirming the determination of the motion for new trial without a hear-

ing, is in conflict with decisions of this Court in **Mesarosh v. United States**, 352 U. S. 1, 14; **Communist Party of U. S. v. Subversive Activities Control Board**, 351 U. S. 115; and **United States v. Shotwell Mfg. Co.**, 355 U. S. 233, 241. In those cases the denial of a hearing on allegations of a similar nature was held to be reversible error.

The ruling of the Court below is also in conflict with **Wheaton v. United States**, 133 F. 2d 522 (8 Cir.), and **Richardson v. United States**, 360 F. 2d 366 (5 Cir.), which concern motions for new trial based on allegations of improper communication with a juror during the trial. Both cases were remanded to the District Court for an evidentiary hearing on the allegations set out in the motions. In **Wheaton**, where, as here, the trial Court had ruled the motion on affidavits, the Court of Appeals commented that the issues of the motion had not been competently determined, since it was apparent that the trial Court and the parties "did not realize the necessity of having evidence adduced". See also **Remmer v. United States**, 347 U. S. 227.

The affidavits filed by the respective parties in this case placed squarely in issue the question of whether the defendants were tried by a fair and impartial jury, or rather by a jury composed of individuals, some of whom had a pre-existing and abiding determination to convict one of petitioners. The affidavits of numerous individuals were in direct conflict with those of the two jurors, as to whether such jurors had expressed their intention to convict petitioner Hoffa if they "got on the jury". If said jurors did in fact make such statements, it is obvious that petitioners' right to a fair and impartial trial was clearly violated, and the subsequent trial was but a mere formality. Similarly, the affidavits filed by the respective parties were in direct conflict on the issues of whether the marshals and jurors were guilty of other acts of impro-

priety during the trial, whether the jurors were permitted to separate, and whether some jurors themselves during the trial expressed bias and prejudice toward the petitioners.[5]

The majority of the Court of Appeals relies on this Court's decision in **United States v. Johnson,** 327 U. S. 106, for support of its decision that the District Court here properly ruled the motion for new trial on the basis of affidavits alone. Reliance on **Johnson** is misplaced, in the circumstances of this case. For in **Johnson,** the contention of the defendant was that a prosecution witness had perjured himself during the trial of the cause. The defense filed affidavits in support of such contention and the government filed counter-affidavits. In ruling that the trial Court could properly consider and determine the motion for new trial on the basis of the affidavits, this Court held that the trial Court was well qualified to pass on the affidavits, since the trial Court had conducted the lengthy original trial and was able to observe closely the disputed witness' testimony, as well as the testimony of all of the other witnesses.

Similarly in other cases cited by the majority in support of its denial of a hearing, such as **United States v. Crowder,** 351 F. 2d 101 (6 Cir.), and **Lyles v. United States,** 272 F. 2d 910 (5 Cir.), the allegations of the particular motions for new trial related to matters occurring in the presence of the trial judge, such as the later recanting of earlier testimony given before the court. In such instances, it may well be that the trial court is quali-

[5] As set out earlier in the Statement, with regard to the allegations of marshal and juror misconduct, affiant Catherine Johnson has been convicted of perjury, and affiant Patricia Ann Essex has been convicted of obstruction of justice. Additionally, the government has asserted that affiant Monday has recanted her prior statements contained in her affidavit. By reason thereof we do not know whether these three witnesses would testify in the event a hearing is ordered.

fied to consider, scrutinize and determine the affidavits filed in view of its earlier first-hand observation of the witnesses and their testimony during the trial. But those cases are inapposite to the situation here in issue. For no observation of the jurors or marshals during the trial could in any way be of assistance to the court in determining whether such jurors and marshals had made extra-judicial statements prejudicial to the defense or engaged in improper conduct outside and away from the courtroom.

An important question for review and decision here therefore is whether, as the Court below rules, a trial court may, notwithstanding allegations of occurrences outside the presence and hearing of the court, choose to consider and decide such allegations without affording the parties a hearing.

III. The Denial of Petitioners' Application to Disqualify the Trial Judge, and to Have Their Motion for New Trial Considered by Another Judge.

This case presents important questions of general interest in the orderly administration of justice relating to the disqualification of a trial court during proceedings pending before said court.

In the consideration of the propriety of the District Court's denial of petitioners' motion to disqualify him, it must be remembered that the motion for new trial itself was based partly on an allegation that the trial Court was biased and prejudiced against the petitioners in that he had made prejudicial remarks outside of court during the trial, stating an intention to see that petitioner Hoffa was convicted. The motion for new trial also alleged misconduct on the part of marshals and certain jurors.

Simultaneously with the filing of such motion for new trial, petitioners moved the Court to disqualify itself from considering and determining said motion for new trial,

on the ground that it was biased and prejudiced against petitioners (App. 89a-92a, 98a-104a).

It was the contention of petitioners in the District Court and in the Court of Appeals that upon the filing of such affidavits of disqualification, pursuant to Section 144, Title 28, United States Code, the District Court should have proceeded no further and another judge should have been assigned to hear the proceedings. Notwithstanding the District Court's denial of the facts set out in said affidavits of disqualification, it was without the province of the Court to consider the truth or falsity of the affidavit. The only question was the sufficiency of the affidavits of disqualification. **Berger v. United States,** 255 U. S. 22. Indeed the trial court is obliged for the purposes of ruling said affidavits of disqualification to accept the truth of the facts asserted and may consider only the legal sufficiency thereof. **Mitchell v. United States,** 126 F. 2d 550 (10 Cir.); **Willenbring v. United States,** 306 F. 2d 944 (9 Cir.).

(a) The affidavit of disqualification asserted that the statements attributed to the trial Court were made during the trial, and that petitioners first learned thereof approximately one week prior to the filing of the affidavit of disqualification (App. 89a-90a). The Court below in affirming the denial of the affidavit of disqualification interprets Section 144 of Title 28, United States Code, as requiring affidavits of personal bias and prejudice to be predicated on facts **preceding** the trial rather than those occurring during the trial. The Court below states that bias and prejudice which occurs during a trial can be remedied only on review by the Court of Appeals. In this respect it should be pointed out that such review here would have been inadequate, since the main appeal from petitioners' conviction had already been determined by the Court of Appeals, at the time of the filing of the affi-

davits of disqualification. Moreover, this interpretation by the Court below of Section 144 is in conflict with **Hurd v. Letts**, 152 F. 2d 121 (D. C. Cir.), and **Willenbring v. United States**, *supra*. Although the statute provides that the affidavit of disqualification shall be filed at least 10 days before the beginning of the term in which the proceeding is to be heard, it excepts from this 10 day requirement the situation where the movant shows good cause for failure to have filed within such 10 day period. In **Willenbring**, it was held that where the case was not assigned until four days prior to a trial, to a judge who is biased against the accused the statutory 10 day period cannot constitute a bar to the consideration of the application. Similarly in **Hurd**, it was ruled that an application seeking disqualification of the trial court may be filed in the middle of a trial if the facts showing bias are not known to the accused until such time. Here the information relating to the bias and prejudice of the trial court was, according to the sworn affidavit of disqualification, learned only one week prior to the filing of the application for disqualification. To bar such application simply because the trial had concluded, where there are before the court important questions on motion for new trial related to whether petitioners were afforded a fair and impartial trial, is to frustrate proper application of the statute and this Court's teaching that our courts "shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial..." **Berger v. United States**, 255 U. S. 22, 36.

(b) The Court below affirmed the denial of the affidavit of disqualification for the further reason that the "statutory requirement as to certificate of good faith of counsel was not complied with" (Op. 6).

The statute requires that the affidavit of disqualification be "accompanied by a certificate of counsel of record

stating that it is made in good faith." The certificate was executed for petitioner Hoffa by Harold Brown and James E. Haggerty, Sr. (now deceased). Haggerty was a member of the Michigan Bar, and had participated in the trial as co-counsel for petitioner Hoffa. Harry Berke, Hoffa's local attorney and a member of the Bar of the District Court below, had withdrawn after trial and prior to the taking of the original appeal. Harold Brown had represented co-petitioner King during the trial and was a member of the Bar of the District Court below. Thus the certificate was executed by a member of the Bar of the District Court, who had in fact participated at the trial below.

Nevertheless, the court below affirms the denial of the affidavit of disqualification by stating that the "statute is not satisfied by having another lawyer, who did not represent the defendant during the trial, execute the certificate" (Op. 7). We submit that it is anomalous to seek to avoid the statutory provision on the ground that the local attorney who had represented said petitioner at trial was no longer available. If such were the rule, an accused whose local counsel has died or become ill or withdrawn from the case for any reason could under no circumstances seek to invoke the provisions of Section 144, and the application of this pertinent statutory provision would be unavailing. This would be contrary to a system of law endeavoring "to prevent even the probability of unfairness." **In re Murchison**, 349 U. S. 133, 136. In the exercise of its supervisory power, this Court should review such statutory interpretation to preclude a resulting denial of due process of law to these petitioners. See **Offutt v. United States**, 348 U. S. 11, 14.

(c) In any event, this Court in the exercise of its broad supervisory power should review the lower Court's approval of the denial of petitioners' motion for disqualifi-

cation of the trial court under Section 455, Title 28, United States Code. As stated, in denying petitioners' earlier affidavits for disqualification under Section 144, the District Court not only denied that he was prejudiced against petitioners, that he knew the affiant Monday, or that he had ever met her or made any statements to her with regard to the petitioners (App. 117a-118a), but also branded her affidavit as "patent perjury" (App. 127a).

Thereafter petitioners moved the Court under Section 455 to disqualify itself on the ground that the Court by virtue of its denial of the factual allegations had in fact predetermined the allegations of the motion for new trial itself, and that the Court thereby was a material witness and had a substantial interest in the matter pending before it.

It must be remembered at said time the government had not yet filed its counter-affidavits to the motion for new trial. There remained for the Court to decide and to exercise its discretion on the issue of whether petitioners were entitled to a hearing on their motion for new trial, the issue of whether petitioners had exercised due diligence in the obtaining of the "newly discovered evidence", and the issue of whether ultimately petitioners were entitled to a vacation of their convictions and a new trial. Surely the matter of the Court's disqualification under such circumstances cannot be held to rest solely, as the Court below said, on whether the trial Court had a "pecuniary" interest in the outcome of the proceeding (Op. 8). For the interest of the trial Court here was greater than that of money. The Court had already ruled on the credibility of a witness in support of the motion for new trial, who had not yet been heard. Further, this witness made serious allegations against the Court itself, which only the Court could deny. Surely then the Court was a material witness, and did have a substantial in-

terest in the case. Since, as this Court has held, even the probability of unfairness must be prevented in our system of law, a court should not be permitted to sit in a case where it has an interest in the outcome. **In re Murchison**, 349 U. S. 133, 136. See also **United States v. Valentino**, 283 F. 2d 634 (2 Cir.).

Totally aside from the issue of the credibility or truth or falsity of the affidavit charging the trial Court with bias, it is urged that having declared said affidavit to be false, the trial Court was no longer in an appropriate frame of mind to consider impartially the matters remaining before it for determination, to-wit, the granting of a hearing, the determination of the legal sufficiency of the motion for new trial, and the ultimate issue of whether to grant a new trial. The statements of the Court indicated an unwarranted prejudgment of an issue in the cause and rendered invalid a resulting judgment of such court. **Knapp v. Kinsey**, 232 F. 2d 458, 466 (6 Cir.). See also the recent case of **Halliday v. United States**, 380 F. 2d 270 (1 Cir.), which involved a motion under 28 U. S. C., Section 2255 alleging that the Court in accepting a plea of guilty had failed to make inquiry as to the voluntariness of the plea and the defendant's understanding of the charges. It was there held improper for the original sentencing Judge, who had made a finding of the voluntariness of the plea, now in effect to review the correctness of his own determination.

Nor is it a sufficient answer to petitioners' contention to hold that they were not prejudiced, on the ground that they were not entitled to a hearing on their motion for new trial. Even if they were not entitled to a hearing, their motion for new trial should have been **considered and determined** by an impartial court, and certainly not by a court which had already made a judicial finding on an issue before it.

CONCLUSION.

For all the reasons hereinabove advanced, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

(Filed Sep. 14, 1967, Carl W. Reuss, Clerk.)

Nos. 16,991, 16,992, 16,993, 16,994.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
James R. Hoffa,
Defendant-Appellant.
No. 16,991.

United States of America,
Plaintiff-Appellee,
vs.
Thomas Ewing Parks,
Defendant-Appellant.
No. 16,992.

United States of America,
Plaintiff-Appellee,
vs.
Larry Campbell,
Defendant-Appellant.
No. 16,993.

United States of America,
Plaintiff-Appellee,
vs.
Ewing King,
Defendant-Appellant.
No. 16,994.

Appeals From the United States District Court
For the Eastern District of Tennessee.

Decided September 14, 1967.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Weick, Chief Judge. These appeals are from an order of the District Court denying Appellants' third motion for a new trial. Like the second one, it was also based on alleged newly discovered evidence. The alleged newly discovered evidence does not relate to the guilt or innocence of Appellants. The motion was not filed until nearly eighteen months after their conviction and one month after we had affirmed. *United States v. Hoffa*, 349 F. 2d 20 (6th Cir. 1965), *aff'd* 385 U. S. 293 (1966), *rehearing denied* February 27, 1967, 386 U. S. 951 (1967).[1]

The third motion alleged misconduct on the part of jurors and United States Marshals who were attending them during their sequestration. In this respect the third motion was similar to the first one, although the allegations of misconduct were embellished to a much greater extent.

After filing the third motion in the District Court, Appellant Hoffa sought to disqualify from hearing the motion the Judge who had presided over his trial which had lasted for nearly two months. He filed an affidavit under Title 28, U. S. C., Section 144, alleging personal bias and prejudice. The Judge ruled that the affidavit was untimely and legally insufficient and ordered it stricken. Hoffa then filed a motion to disqualify him under Title 28, U. S. C., Section 455, which the Judge considered and denied. The other Appellants adopted Hoffa's third motion for a new trial and his affidavit of bias and prejudice and motion to disqualify. We will consider first the affidavit of bias and prejudice and the motion to disqualify.

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[1] On February 20, 1967 the Supreme Court denied Appellants' motion to vacate judgment, which alleged violation of their constitutional rights by the use of electronic devices. 386 U. S. 940.

There is also pending in this Court an appeal from an order of the District Court denying Appellants' fourth motion for a new trial on newly discovered evidence containing similar allegations.

Affidavit of Personal Bias and Prejudice Under Section 144.

The only factual support for this affidavit was furnished by the affidavit of a prostitute named Marie Monday, who stated that on two different occasions, "Some time late in January, 1964, or the early part of February, 1964, during the course of the trial of the Hoffa case," she met the presiding Judge at the hotel where the jury was sequestered, and that on the first occasion the Judge told her that he was in charge of the "Hoffa" trial and that "Hoffa was going to get what was coming to him this time and that he was going to see to it that he did." On the second occasion the judge is alleged to have told her, "Don't you worry, he [Hoffa] is going to be convicted" because he [the Judge] was "in charge of it."

The Judge in a written opinion held that the affidavit was insufficient on its face; that it was not timely filed; that it did not comply with the statutory requirement of a certificate of counsel; and that it was not authorized by the statute since it was the second such affidavit filed in the case, the statute permitting the filing of only one affidavit.

After passing upon the sufficiency of the affidavit of bias and prejudice, the Judge then categorically denied that he had ever made the statements set forth in the prostitute's affidavit, to anyone, including her. He denied that he had ever met her or had a conversation with her, and denied that he was in the hotel where the jury was sequestered, or even in the vicinity of it, at any time during the trial, and stated that he had purposely stayed away from the hotel. He denied that he held any bias or prejudice against any of the Appellants. He pointed out that he had directed a verdict of acquittal for defendant Hoffa on one of the counts of the indictment. The jury had also acquitted defendants Hoffa, Dorfman and Tweel on Count IV

of the indictment. The Judge stated that the prostitute's affidavit "is a complete and total fabrication and fraud" and that he would not "be deterred by such patent perjury from doing his duty. . . . Each defendant will continue to receive every right accorded to him under the law."

There can be no question but that the Court was required to pass upon the sufficiency of the affidavit of bias and prejudice. *Berger v. United States,* 255 U. S. 22, 32 (1920); *Refior v. Lansing Drop Forge Co.,* 124 F. 2d 440, 444 (6th Cir. 1942), *cert. denied,* 316 U. S. 671 (1942); *Shea v. United States,* 251 Fed. 433 (6th Cir. 1918), *cert. denied* 248 U. S. 581 (1918). The statute does not permit the Court to inquire into the truth of the facts alleged in the affidavit.

The Judge ought not to be precluded from answering the attack upon him which contained innuendoes concerning his conversations with a prostitute and made a mockery of the administration of justice in a United States Court.

Understandably, he did not want the scandalous allegations concerning him to remain unchallenged in the record. See *Cole v. Loew's, Inc.,* 76 F. Supp. 872, 877-8 (S. D. Cal. 1948). His answer did not exhibit bias or prejudice. In any event, his answer did not affect the validity of his ruling that the affidavit was legally insufficient.

The statute would seem to require affidavits of personal bias and prejudice to "be based upon facts antedating the trial, not those occurring during the trial," *Berger v. United States, supra* (page 34); *Ex Parte American Steel Barrel Co.,* 230 U. S. 35 (1913). Bias and prejudice occurring during the trial can be corrected on review by the Court of Appeals, *Knapp v. Kinsey,* 232 F. 2d 458 (6th Cir. 1956), *cert. denied* 352 U. S. 892 (1956). See also *Taylor v. United States,* 179 F. 2d 640 (9th Cir. 1950)

(affidavit not filed until defendant moved to vacate sentence, untimely); *Ex parte Glasgow,* 195 Fed. 780 (N. D. Ga. 1912), *aff'd sub nom. Glasgow v. Moyer,* 225 U. S. 420 (affidavit not filed until after motion in arrest of judgment and new trial, untimely). Nor was the statute

> ". . . intended to paralyze the action of a judge who heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. . . ."
>
> *Ex parte American Steel Barrel Co., supra,* at page 44.

But Appellants have additional hurdles to overcome. The statute required the filing of "a timely and sufficient affidavit," *Refior v. Lansing Drop Forge Co., supra.* It further provided that the affidavit "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."

In his affidavit for disqualification, defendant Hoffa stated that he first learned of these matters on August 23, 1965, and could not have learned of them any sooner through the exercise of due diligence. This does not explain why it took nearly eighteen months to learn about events alleged to have taken place during the trial. The affidavit does not state what diligence, if any, was exercised to discover this information nor why it could not have been discovered sooner.

But it appeared from the first motion for a new trial filed on March 10, 1964, and the affidavits filed in support thereof, that Appellants alleged misconduct of Marshals and jurors; that the Marshals furnished large quantities of intoxicating liquors to the jurors and entertained them; and that Ezell Ervons, one of the porters at the hotel, arranged for a girl to visit a Marshal. A bellboy named

Culpepper signed an affidavit that he saw a lot of drinking going on on the tenth floor where the jurors were staying and that he saw some of the jurors standing around with drinks in their hands. Another bellboy named Ball mentioned drinking on the floor of the hotel where the jurors were staying.

In support of the third motion for a new trial, Appellants procured another affidavit from this same bellboy, Culpepper, which stated that during the trial on several occasions he called a girl named Marie and a girl named Bobbie, to come to the hotel, and that after each visit the girl would give him a tip. Marie is the prostitute Monday's given name.

Monday, in another affidavit which was filed in support of the third motion for a new trial, stated that she went to the hotel on numerous occasions during the trial and that on some of these occasions she saw Culpepper, Ball and Ervons.

Since Appellants knew of the bellboys and the porter in March, 1964, and had obtained affidavits from some of them relating to misconduct of Marshals and jurors, it would seem to us that the more scandalous material now alleged was then available and could have been obtained from the same bellboys and porter. Under these circumstances, we do not believe that the failure of the District Court to infer diligence was wrong, and in our judgment "good cause" for the delay was not established.

On its face, the affidavit of the prostitute Monday is vague and equivocal and leaves much to inference and conjecture. She does not state how or under what circumstances she happened to meet the Judge, nor the place in the hotel where the meeting is alleged to have taken place, nor who introduced her. She is hazy as to the time. Although she claims she met the Judge, she qualifies her

identification by stating that she knows he is the same person whom she saw on television and whose picture she had seen in a newspaper. One would certainly have to be most credulous to believe that a United States Judge, presiding over a criminal trial, would go to a hotel where the jury was sequestered, meet a prostitute under unexplained circumstances, and confide in her his feelings of bias and prejudice against one of the defendants. The District Judge, however, was precluded, as we are, from making inquiry into the truthfulness of the statements alleged in the affidavit. *Berger v. United States, supra.*

There are other defects in the affidavit. The statutory requirement as to a certificate of good faith of counsel was not complied with. The only counsel of record for defendant Hoffa, who was admitted to the bar of the Court, had withdrawn from the case and did not sign the certificate. The signature of James E. Haggerty, Sr., a Michigan lawyer who had not been admitted to the bar of the Court, appears thereon. Haggerty, by telegram, had authorized a Washington, D. C. lawyer, who was not an attorney of record or admitted to the bar of the Court, to affix his signature on all papers and documents in connection with the case. Harold E. Brown, who was attorney of record for Appellant King, requested that his name be entered as local counsel for Mr. Hoffa on the date the third motion for a new trial was filed, and he signed the certificate. He had been duly admitted to the bar of the District Court.

The certificate must be signed by an attorney who is a member of the bar of the Court. *Currin v. Nourse,* 74 F. 2d 273 (8th Cir. 1934), *cert. denied* 294 U. S. 729 (1935). The purpose is to shield a court which cannot test the truth of the facts alleged in the affidavit. The statute is not satisfied by having another lawyer, who did not represent the defendant during the trial, execute the certificate.

The statute further provided:

> "A party may file only one such affidavit in any case."

The affidavit involved here was the second such affidavit filed in this case by Appellant Hoffa. The first affidavit was filed against District Judge Frank Gray, Jr., who, after ruling that the affidavit was insufficient, voluntarily and contemporaneously recused himself.

It is contended that the statutory limitation of one affidavit should be construed so as to apply only to a case where the Judge rules that the affidavit is sufficient and he is disqualified thereby. But this is not what the statute says, and its language is clear and plain.

Here the affidavit of bias and prejudice filed against Judge Gray, although insufficient, accomplished its purpose, namely it got rid of the judge who was scheduled to hear the case, and secured another judge against whom appellants could and later did file a second affidavit of bias and prejudice after the case had been decided and reviewed by this Court.

The statute does not provide a remedy similar to habeas corpus or Title 28, Section 2255 proceedings, where successive petitions may be filed. In plain and unequivocal language the statute permits only one affidavit of bias and prejudice to be filed by a party in a case. *Martin v. Texas Indem. Ins. Co.*, 214 F. Supp. 477 (N. D. Tex. 1962), *cert. denied* 377 U. S. 971 (1964).

The District Judge did not err in refusing to recuse himself. Since the affidavit alleged personal bias and prejudice only with respect to the defendant Hoffa, the other appellants have no standing to question the ruling.

Motion to Disqualify Under Section 455.

The basis for this motion is that the District Judge, by answering the attack upon himself, in some manner became a material witness in the case and therefore was disqualified under Section 455 from passing upon the motion for a new trial.

The fact that the judge ruled adversely to Appellants on their Section 144 affidavit of bias and prejudice, provided no ground for the disqualification of him under Section 455. Appellants were granted a review of the Judge's ruling on their Section 144 affidavit, which we have found to be correct. No hearing was held in the District Court on the Section 144 affidavit as it was disposed of entirely on the basis of its insufficiency. Nor do we believe that an oral hearing was required on the third motion for a new trial, as we will point out later.

The Judge did not have a substantial interest (pecuniary) in the case, nor was he a material witness. See *United States v. Smith,* 337 F. 2d 49 (4th Cir. 1964), *cert. denied* 381 U. S. 916 (1965). There is an obligation upon a Judge not to recuse himself when there is no occasion. *In Re Union Leader Corp.,* 292 F. 2d 381 (1st Cir. 1961).

The Third Motion for a New Trial.

The misconduct alleged against the jurors and Marshals was that during the course of the trial, while the jurors were sequestered in a hotel, the Marshals furnished intoxicating beverages and other favors to them, and that they imbibed to excess and discussed the case among themselves and others, in violation of the Court's instructions, and made statements concerning the guilt of Appellants, and exhibited bias and prejudice against Appellants. It was alleged that two of the jurors, prior to the trial, had expressed opinions to fellow employees as to Mr. Hoffa's guilt and had made statements indicating

bias and prejudice against him and also against labor unions.

It was further alleged that the Marshals furnished prostitutes to seven of the jurors and that the jurors had intercourse with the prostitutes in their hotel rooms. It was alleged that the Marshals paid the prostitutes twenty dollars for each service, and had made remarks prejudicial to Appellants in the presence of the jurors. The purport of the motion was that the Marshals and jurors were engaged in the evenings at the hotel in wild, drunken orgies and parties with prostitutes and that at least seven of the jurors were immoral and biased persons unfit to serve as jurors.

The motion was accompanied by affidavits of four prostitutes, two bellboys who claimed to have acted as procurers, and six men who worked at the same plant as two of the jurors. Other affidavits were filed which relate to the time and circumstances under which the affidavits of the bellboys, prostitutes and fellow employees had been procured.

The Government filed counter-affidavits of all of the jurors and alternates (except one, who was critically ill) and of the Marshal and Deputy Marshals who assisted in the care and custody of the jury during the trial.

Each juror and alternate juror categorically denied that a Marshal had furnished him with intoxicating beverages or other favors; denied that a Marshal had furnished him with a prostitute; denied that he had intercourse with a prostitute; denied that he had discussed the case or made statements concerning the guilt of the Appellants or indicating bias or prejudice. Some of the jurors did admit taking a drink before the evening meal, but denied drinking to excess, and stated that they paid for their own drinks. All of the Marshals denied the charges of misconduct alleged in the affidavits.

The District Judge, in a comprehensive opinion, held that the motion on its face was legally insufficient because many of the acts of misconduct now claimed to be newly discovered, were asserted in the original motion for a new trial and there is no showing of any facts upon which diligence might be inferred.

Motions for a new trial on newly discovered evidence are not favored and should be granted only with great caution. *United States v. Costello,* 255 F. 2d 876 (2nd Cir. 1958), *cert. denied* 357 U. S. 937 (1958); *Weiss v. United States,* 122 F. 2d 675 (5th Cir. 1941), *cert. denied* 314 U. S. 687 (1941); *United States v. West,* 170 F. Supp. 200 (N. D. Ohio, 1959), *aff'd* 274 F. 2d 885 (6th Cir. 1960), *cert. denied sub nom. Haug v. United States,* 365 U. S. 811 (1961).

We have repeatedly held that the granting or refusing to grant such motions rests within the sound discretion of the District Court and its action must stand in the absence of a clear showing of abuse of discretion. *United States v. Crowder,* 351 F. 2d 101 (6th Cir. 1965); *United States v. Lewis,* 338 F. 2d 137 (6th Cir. 1964), *cert. denied* 380 U. S. 978 (1965); *United States v. Barnhill,* 305 F. 2d 164 (6th Cir. 1962), *cert. denied* 371 U. S. 865 (1962); *Ashe v. United States,* 288 F. 2d 725 (6th Cir. 1961); *Stern v. United States,* 260 F. 2d 365 (6th Cir. 1958); *Winer v. United States,* 228 F. 2d 944 (6th Cir. 1956), *cert. denied* 351 U. S. 906 (1956); *Sharp v. United States,* 195 F. 2d 997 (6th Cir. 1952).

In order to be entitled to a new trial on newly discovered evidence, it was incumbent on Appellants to establish that the evidence was newly discovered since the trial and facts must be alleged which infer diligence on the part of the mover. *United States v. West, supra,* 170 F. Supp. at page 208; *Wion v. United States,* 337 F. 2d 230 (10th Cir. 1964); *Ferina v. United States,* 302 F.

2d 95 (8th Cir. 1962), *cert. denied sub nom. Cardarella v. United States,* 371 U. S. 819 (1962); *Gallegos v. United States,* 295 F. 2d 879 (9th Cir. 1961), *cert. denied,* 368 U. S. 988 (1962).

We agree with the District Court that many of the alleged acts of misconduct now relied on were not "newly discovered" at all, but were alleged in support of the original motion for a new trial. These included the charges with respect to the Marshals' supplying jurors with intoxicating beverages, and drinking with and entertaining the jurors; that the jurors mingled with other people and considered matters not introduced in evidence; that jurors were discussing Hoffa, in the hallway; that a porter got a girl for a Marshal and let them use a room. These charges were all denied in counter-affidavits. The District Judge gave careful consideration to the charges in ruling on the original motion for a new trial. In so doing he took into account the appearance and demeanor of the jurors as he saw them each day during the trial, which lasted nearly two months, their attentiveness, and their verdict which acquitted some of the defendants and convicted others. He found the charges to be without foundation. We affirmed his findings, 349 F. 2d 20, 50, and certiorari was not applied for on this ground.

It also appeared from the record of that motion that sums of money were offered or given to bellboys to sign affidavits charging misconduct of Marshals and jurors. It further appeared that Mrs. Emolene Akers, a juror who had been charged with making prejudicial statements in Tennessee (after the verdict), was in Florida at that time.

The affidavits of the four prostitutes, however, were not before the District Judge when he ruled on the first motion for a new trial. But, as we pointed out in discussing the affidavit of bias and prejudice, the prostitutes were known to the bellboys who procured them. These

bellboys signed affidavits concerning misconduct of jurors and Marshals which were filed in support of the original motion for a new trial. With these leads available, no plausible explanation was given as to why appellant should not then have been able to secure from the prostitutes the same information which he obtained nearly eighteen months later. If such nightly revelry ever took place in the hotel with so many people involved, its notoriety would have been most difficult to conceal from the appellants and their alert attorneys and investigators. The defense did not overlook investigation of jurors and even employed an electronics expert to intercept FBI radio communications. See *United States v. Hoffa*, 349 U. S. 20, 39. Apparently no difficulty was experienced in "discovering" the misconduct after the judgment was affirmed.

The District Judge concluded from the record that diligence in procuring the information could not be inferred, and we agree.

We also agree with the trial Judge that diligence can not be inferred in procuring the information that two of the jurors had made statements prior to the trial indicating bias and prejudice.

But the trial Judge went further. He considered the affidavits and counteraffidavits and made findings of fact. It was unnecessary for him to do this since there was adequate basis for denying the motion on the ground of lack of diligence. He was apparently motivated by a desire to pass upon all of the issues. We will therefore review his findings.

The trial Judge found as a fact that no juror or alternate juror was at any time furnished a prostitute by any Marshal, nor did any juror have any contact with or engage in any conversation with any prostitute, including

the four named prostitutes; that no juror at any time prior to submission of the case discussed the case with anyone or expressed any opinion as to the guilt or innocence of any Appellant, or made any comment or expressed any prejudice against any Appellant, nor were any statements prejudicial to Appellants made by any third party in the presence of the jury, nor did any juror fail to fully and truthfully respond upon his respective voir dire examination; that no Marshal had made any remark prejudicial to any Appellant or in the presence of a juror; that no Marshal had provided any juror with alcoholic beverages or bestowed other gifts or favors upon any juror, or did anything calculated to influence any juror; that no unauthorized separation of the jury occurred during the trial of the case and at no time was any juror out of the presence of a Marshal; that the Marshals had at all times during their attendance upon the jury conducted themselves in accordance with the instruction of the Court.

The Court placed no credence upon the affidavits of the four prostitutes "who admit selling their bodies, if not their signatures, for immoral purposes for $20," nor did he believe the affidavits of the two who claimed they were procurers of the prostitutes, but who did not purport to identify any of the jurors, nor did he credit the affidavits of fellow employees of two jurors, pointing out that one of them, after giving an affidavit accusing a juror of perjury on his voir dire examination, had invited the same juror to a social affair at which alleged statements of jury misconduct were made by the juror.

In our opinion, these findings of fact are supported by substantial evidence and are not clearly erroneous. In denying the third motion, the District Judge did not abuse his discretion.

Were Appellants Entitled to an Oral Hearing, With Live Witnesses, on Their Charges of Juror and Marshal Misconduct?

This same point was raised in the direct appeal, where it was argued that Appellants were entitled to an oral hearing on their original motion for a new trial charging misconduct of jurors and Marshals. Affidavits in support of that motion were filed and the Government filed counteraffidavits. We held that the District Court did not abuse its discretion by denying the motion for a new trial without an oral hearing. Appellants did not seek certiorari on this issue and our ruling has become the law of the case.

Moreover, an oral hearing was not required to determine whether diligence was exercised in filing the third motion for a new trial, because lack of diligence was apparent on the face of the record.

Both first and third motions for a new trial alleged misconduct of jurors and Marshals of much the same nature. They both had their foundation in a common source of information, namely, the bellboys, which lead to the prostitutes and was available at the time the first motion was filed, nearly eighteen months prior to the third one.

Nor do we believe a District Court is required to conduct an oral hearing on a motion for a new trial in every case, no matter how outlandish, imaginative, and irresponsible the allegations might be.

It has long been settled that the District Court may hear a motion for a new trial on newly discovered evidence and decide it on affidavits. Where affidavits and counteraffidavits are filed, the Court may adopt findings of fact. This procedure was approved by the Supreme Court in *United States v. Johnson*, 327 U. S. 106 (1945).

In that case the Court of Appeals had set aside findings of fact of the District Court adopted upon consideration of affidavits and counteraffidavits, and reached a different conclusion on the facts. The Supreme Court reversed the Court of Appeals, holding that the District Court's findings of fact were supported by substantial evidence, and that Appellate Courts should "refrain from reviewing findings of fact which have evidence to support them", *id.* 113.

In *Johnson* the defense claimed that a Government witness had perjured himself and submitted affidavits to establish this fact. Counteraffidavits were filed by the Government. In that case the facts substantiating the allegations of perjury by the witness were, as almost always must be the case, outside the personal knowledge and observations of the trial judge. What the trial judge did see (and what the Supreme Court thought made him exceptionally qualified to pass on the motion without a hearing) was the demeanor of the witness on the stand while he was supposedly perjuring himself.

In our case the alleged improper conduct took place outside of the courtroom and the presence of the District Judge, but like the Judge in the *Johnson* case, he did see the jurors every day while they were supposedly repeatedly violating their oaths (as well as his frequent instructions as to their duties as jurors).

Thus the critical observations of the trial judges in *Johnson* and *Hoffa* were the same; they daily viewed closely people who were supposedly breaking their oaths as witnesses and jurors; neither judge had firsthand knowledge of the facts stated in the affidavit. The Judge in *Johnson* compared his knowledge of the witness' demeanor with the allegations of the motion for a new trial and concluded that the witness had not broken his oath;

the District Judge made a similar comparison in the present case when he ruled upon the first motion for a new trial. The observations which he then made, which are set forth at length in our opinion on the direct appeal, apply with equal force here. 349 F. 2d 20, at page 50.

We think *Johnson* is dispositive of this case and is binding upon us. We find no basis to distinguish it. We will not give credence to factual claims which the trial judge, on consideration of the affidavits in the light of his personal knowledge of what transpired at the trial, has found to be untruthful.

We followed *Johnson* in *United States v. Crowder,* 351 F. 2d 101 (6th Cir. 1965) and in *Stern v. United States,* 260 F. 2d 365 (6th Cir. 1958). Other Circuits have followed the same rule. *United States v. Astore,* 309 F. 2d 144 (2nd Cir. 1962); *United States v. Troche,* 213 F. 2d 401 (2nd Cir. 1954); *Ewing v. United States,* 135 F. 2d 633 (D. C. Cir. 1942), *cert. denied,* 318 U. S. 776 (1943). *Lyles v. United States,* 272 F. 2d 910 (5th Cir. 1959) recognized this rule but remanded for an oral hearing because the Government joined with the defense in requesting it.

This is not a case where a witness has recanted, or where the Government's witness has testified falsely, or where the Government has confessed error. Nor has any Marshal or juror reported any wrongdoing to the Court. *Cf., Remmer v. United States,* 347 U. S. 227 (1954). Furthermore, this is not a habeas corpus or Section 2255 proceeding, involving different statutory procedures.

In our opinion, the body of law which has developed in connection with motions for a new trial on newly discovered evidence has not been overturned or rendered obsolete by these statutory post-conviction procedures which are not before us. We apply the rule in *Johnson* and have no authority to overrule or limit it.

Our dissenting brother states that he will feel better if James Hoffa and his co-defendants are given no more but no less consideration than is obtainable by every person charged with crime. We believe that they have already been accorded such consideration. We are bound to apply the law as we find it regardless of the person involved.

The record here does not indicate any lack of concern or consideration by the courts of Appellants' claims. In these and related cases literally hundreds of legal questions have been raised. Hoffa's first motion for a new trial contained ninety different grounds. In appellants' direct appeal sixteen main questions were presented, which were divided into thirty-six parts. This is the third appellate review, and a fourth appeal is pending.

The Supreme Court has affirmed Hoffa's conviction. He was represented by a battery of able and experienced trial lawyers who overlooked nothing. He did not lack investigators.

The Courts are always open to hear as many proceedings as Hoffa and his co-defendants may desire to commence.

In a footnote the dissent alludes to the post-conviction proceedings of one Townsend, who was convicted of murder and sentenced to death, as showing the concern of today's courts for those who are charged with or convicted of crime. However, Townsend's various proceedings principally involved the question of whether his confession was voluntary, and they ultimately resulted in no gain for him except delay. When all of Townsend's efforts are compared with those of Hoffa, as above set forth, they appear to be minuscule.

The reliance in the dissent on the rule applicable to summary judgment in civil cases, is misplaced. No sum-

mary judgment was entered on the merits of this case. There was a protracted trial by jury. We do not agree that the carefully prepared and well reasoned opinion of the District Judge dealing with the troublesome problems raised in the third motion, constituted an easy dispatch of that motion. His procedure was fully authorized by *Johnson* and the other cases cited in his opinion.

The Government secured affidavits from the jurors in connection with the original motion for a new trial and again in resisting the third motion for a new trial. We think these contacts with the jurors are about enough. There is the countervailing consideration of protecting the jurors from inquisition, harassment and unnecessary embarrassment in a hearing. This consideration involves more than just the sensibilities of the individual jurors, but also the integrity of the judicial process. If defendants could so easily force jurors into lengthy and scandalous hearings, reputable members of the public would certainly be reluctant to serve.

The question of whether to determine the motion on affidavits or in a hearing, was within the discretion of the trial court. We find no abuse of discretion.

Affirmed.

O'Sullivan, Circuit Judge, dissenting in part.

I regret that I cannot fully agree with my brothers of the majority. I do not express a view that a new trial should be granted, but would remand the case to the District Judge for a hearing upon the issues raised by the affidavits supporting, and those opposing, the motion for new trial.[1]

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[1] I would not require any hearing on the charges made against the trial judge—one of our distinguished and able District Judges. The falsity of the charges made against him is, of course, within his personal knowledge.

Defendants file numerous affidavits describing conduct of jurors and United States Marshals which, if true, denied defendants their constitutional right to trial by jury. If the identified jurors and the marshals did half of what is charged to them, the Hoffa trial was, as far as they were concerned, an idle and frivolous ceremony; guilt of Hoffa and his co-defendants was assumed by some of them, and for nearly all of the male jurors the period of their sequestration provided the occasion and opportunity for revelry and illicit sexual indulgence. Neither the District Judge's opinion nor the government's address to us suggests that such conduct, if it actually took place, could be viewed otherwise than as depriving the defendants of a fair trial.

If the accusing affidavits are untrue, the filing of them constitutes brazen criminal activity—false swearing by the affiants (some eleven different deponents make up the company of possible false swearers) and the deliberate subornation of perjury by others. Their execution and the procuring of them, in such circumstances, would constitute as vicious and despicable an attempt to undermine the integrity of our entire court system as the original charges of jury tampering. But even though we may entertain personal belief that the mentioned affidavits of the prostitutes and others were perjured, we may not, in my view, approve a disposition of such serious charges solely upon the affidavit denials of the accused jurors and marshals. The very gravity of the situation forbids its easy dispatch.

While the District Judge discussed the question of the delay in making the involved motions and whether the allegations contained in the affidavits could properly be regarded as "newly discovered evidence," he went on to dispose of the motion as follows:

> ". . . the Court can and will however decide the factual issues raised by the present motion for new

trial on the basis of the affidavits and counter-affidavits filed herein. *The law is well settled that a motion for new trial based upon newly discovered evidence may be decided by the Court upon the affidavits and counter-affidavits filed in support and opposition to the motion.*" (Emphasis supplied.)

In affirming him, my colleagues say,

"It has long been settled that a Court may hear a motion for a new trial based on newly discovered evidence *and decide it on affidavits.* Where affidavits and counter-affidavits are filed, the Court may adopt findings of fact." (Emphasis supplied.)

I must respectfully disagree that there is such a broad rule properly applicable to the type of situation we deal with here. The opinions recited as supporting the rule relied upon, *United States v. Johnson,* 327 U. S. 106 (1946); *United States v. Astore,* 309 F. (2) 144 (C. A. 2, 1962); *Lyles v. United States,* 272 F. (2) 910 (C. A. 5, 1959); *Stern v. United States,* 260 F. (2) 365 (C. A. 6, 1958); *United States v. Troche,* 213 F. (2) 401 (C. A. 2, 1954); *Ewing v. United States,* 135 F. (2) 633 (C. A. D. C., 1942), *cert. den.* 318 U. S. 776; *Hillman v. United States,* 192 F. 264 (C. A. 9, 1911), *cert. den.* 225 U. S. 699; *United States v. Crowder,* 351 F. (2) 101 (C. A. 6, 1965), are not apposite in the context of this case. In the main, they are decisions where the newly discovered evidence consisted of post-trial declarations by individuals that testimony given by prosecution witnesses was perjured, evidence that would add to or corroborate defense testimony, or evidence by a prosecution witness recanting his trial testimony. Generally, the judge hearing the motion had seen and heard the witness whose trial testimony was challenged by the newly discovered evidence.

The opinion most cited for the claimed permissibility of resolving factual issues presented by a motion for new

trial upon affidavits is *United States v. Johnson,* 327 U. S. 106, *supra,* in which the factual issue presented was whether a prosecution witness had testified falsely. The charges of false swearing were made in affidavits supporting motions for new trial; opposing affidavits were filed by the government. The trial judge denied a first motion and his conduct was described by the Supreme Court as follows:

> "The trial judge in a carefully prepared opinion covering fifty-six pages of the record, gave thoughtful consideration to each affidavit, reached the conclusion that none of them showed that Goldstein had perjured himself, and found both from the new affidavits *and his own knowledge of the original six-weeks trial that Goldstein's testimony was true.* The motion for a new trial was consequently denied." 327 U. S. at 109. (Emphasis supplied.)

A second motion for new trial, based upon further newly discovered evidence, was also denied by the trial judge. In approving this conduct, the Supreme Court said,

> "The trial judge's findings *were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day.* Consequently, the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration." 327 U. S. at 112. (Emphasis supplied.)

The critical difference between *Johnson* and the case before us lies, as it does in the other cases relied upon by the majority, in the fact that the charged misconduct *there* involved—false testimony—occurred within the immediate view and attentive hearing of the trial judge. The judge

had also seen and heard the testimony of all of the witnesses sworn at the trial. This evidence was part of the material available to the trial judge in resolving the question of whether the accused witness had testified falsely. I do not read *Johnson* as holding that an issue of fact such as is presented by the competing affidavits filed in this case can be resolved solely by consideration of the affidavits.

In *United States v. Crowder, supra,* and in *Gordon v. United States,* 178 F. (2) 896 (C. A. 6, 1949), *cert. den.* 339 U. S. 935, we were presented with situations analogous to the *Johnson* case—situations in which witnesses had testified at trial in the presence of the District Judge, and later gave recanting affidavits—situations not involved in the case before us. We said in *Crowder:*

> "In this case the district judge heard Tucker's testimony before the jury . . . This same witness now has undertaken by affidavit to change his story. . . ." 351 F. (2) at 104.

And we quoted from *Lyles v. United States, supra,* that:

> "*Ordinarily,* the district court may in its discretion determine a motion for new trial upon affidavits without more. *Ewing v. United States,* 1942, 77 U. S. App. D. C. 14, 135 F. (2) 633, 638. There are, however, *exceptional cases* in which an oral hearing should be granted. . . ." *Id.* at 104, 105. (Emphasis supplied.)

But notwithstanding the above language, the Fifth Circuit in *Lyles* reversed the district judge, who had denied a motion for new trial solely on the basis of the affidavits, and remanded the matter for an evidentiary hearing. A reading of *Ewing v. United States,* 135 F. (2) 633 (C. A. D. C., 1942), *cert. den.* 318 U. S. 776, cited in *Lyles,* leaves uncertain the contents of the affidavits there, but again they dealt with conduct observed in open court. Without further analysis of the other opinions relied on for the

assertion that *in this case* it was proper to dispose of the motion solely upon the conflicting affidavits, my own study of them and their special facts persuades me that they do not support or announce the broad proposition of law relied on by the District Judge.

It should be noted that in disposing of an earlier motion for new trial charging misconduct by the jury, the District Judge took occasion to emphasize his own observations of the good conduct of the jury while in his presence, and his inquiries of the deputy marshals as to their proper care of the jurors. These observations were not included in his memorandum denying the motion here involved. But even had they been, that would not suffice: all of the misconduct now charged, if true, occurred *outside* of the courtroom and *outside* of the presence of the judge; the affidavits include statements that contrary to their responsibilities while they were sequestered, the jurors and marshals were in contact and communication with strangers to the case on trial. Prejudice to the defendants would be presumed if these events actually occurred. See *Mattox v. United States,* 146 U. S. 140, 148-50, 36 L. Ed. 917, 920, 921 (1892); *Remmer v. United States,* 347 U. S. 227, 229, 98 L. Ed. 654, 656 (1954); *Ryan v. United States,* 191 F. (2) 779, 780, 781 (C. A. D. C., 1951).

I find no decision which provides clear precedent for the stand I take. However, in *Wheaton v. United States,* 133 F. (2) 522 (C. A. 8, 1943) and in *Richardson v. United States,* 360 F. (2) 366 (C. A. 5, 1966), the respective courts of appeals remanded for evidentiary hearing, charges of improper communication with a juror, made in motions for new trial. I concede that their facts provide some distinctions from the matters before us. They do, though, emphasize the importance of taking testimony to resolve issues arising from claims of extraneous interference with a jury's consideration of a case. In remanding in *Richardson,* the Court said:

"The allegation of fact in the third ground of the motion that the witness Treherne engaged in a private conversation with one of the jurors must stand as confessed since no hearing was conducted. Prejudice will be assumed in the form of a rebuttable presumption [citations omitted]. In failing to conduct 'a thorough inquiry . . . to determine exactly what . . . occurred' before overruling the motion, the trial court abused its discretion." 360 F. (2) at 369.

Moreover, in numerous post-conviction applications for relief in habeas corpus and § 2255 matters, the United States Supreme Court has admonished repeatedly against disposing of factual assertions regarding constitutional wrongs without an evidentiary hearing. In *Walker v. Johnston,* 312 U. S. 275 (1941), the Court, dealing with a factual issue presented in a habeas corpus petition, said:

"On a hearing he [the defendant] would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination ore tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. *The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence.* On this record it is his right to be heard." 312 U. S. at 286-7. (Emphasis supplied.)

Such also is the rule of *Machibroda v. United States,* 368 U. S. 487, 495 (1962), which we followed in *Scott v. United*

States, 349 F. (2) 641, 643 (C. A. 6, 1965). To the same effect, see *Doyle v. United States,* 336 F. (2) 640, 641 (C. A. 9, 1964); *Wright v. Dickson,* 336 F. (2) 878, 882, 883 (C. A. 9, 1964); *Romero v. United States,* 327 F. (2) 711, 712 (C. A. 5, 1964); *Evans v. Eyman,* 363 F. (2) 540, 542 (C. A. 9, 1966); *Del Piano v. United States,* 362 F. (2) 931, 933 (C. A. 3, 1966). While these cases do not involve motions for new trial on newly discovered evidence, they expose the law's current and especial concern that claims of deprivation of constitutional rights be not summarily disposed of. In my view, it would be anomalous to have required an evidentiary hearing had the defendants chosen to present the identical charges now before us in a § 2255 petition, filed after they had been taken into custody, but to deny such a hearing on the present motion.[2]

Trial judges are not permitted to resolve issues of fact presented by opposing affidavits in summary judgment proceedings (*6 Moore's Federal Practice,* § 56.11 [3], p. 2163), and I am not aware of any other procedure which permits a trial judge to adjudicate essential and critical issues of fact solely upon his reading, and his own weighing of the relative probative worth, of conflicting affidavits.

Were my view to prevail, I would indeed share the regret of my colleagues and the District Judge that jurors be subjected to the annoyance, publicity and inconvenience that would be visited upon them by an evidentiary hearing. And I would regret the burden on the judiciary from repetitive efforts of one convicted of crime to escape the

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[2] Were charges of the kind here involved made in habeas corpus or in a Section 2255 petition, the subject of diligence, so emphasized by my brothers of the majority, would be irrelevant in determining whether a hearing should be had. I do not think that the form of presenting such type of charges gives reality to the distinction relied upon by the majority opinion; we are dealing here not with the traditional type of motion for new trial, but one which in all pertinent respects fits more closely into the context of a habeas corpus proceeding.

law's punishment.[3] But the law is patient and does not tire of examining into the question of fair trial. The now landmark case of *Townsend v. Sain*, 372 U. S. 293 (1963), involved the claim of unfair trial by one convicted of murder in the first degree. Townsend was convicted in 1955 and in the ensuing 12 years his charges of constitutional deprivation have been considered and reconsidered approximately 18 times by various levels of state and federal judicial authorities.[4] As of the last of the appellate decisions set out in footnote 4, Townsend's 1955 conviction was found to be without fault, but it is my understanding that application has since been made for further judicial scrutiny.

That I may entertain a personal belief that the spectacular story told by the affidavits produced by Hoffa and his co-defendants is pure fabrication and perjurious does not permit me to deny an evidentiary hearing. Such a hearing may indeed provide the best means of exposing and punishing a deliberate and sinister attempt to vitiate

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[3] The United States Courts, however, are not without potent weapons to discourage these impositions. Their awesome power to punish for contempt or perjury, if courageously employed, will provide needed deterrents.

[4] Townsend's conviction has been reviewed as follows: *conviction affirmed, People v. Townsend,* 11 Ill. (2) 30, 141 N. E. (2) 729 (1956), *cert. den., Townsend v. Illinois,* 355 U. S. 850 (1957); post-conviction relief *denied* in Illinois state trial and Supreme Courts, *cert. den., Townsend v. Illinois,* 358 U. S. 887 (1958); post-conviction relief in federal District Court *denied, appeal dismissed, U. S. ex rel. Townsend v. Sain,* 265 F. (2) 660 (C. A. 7, 1958), *rev'd and remanded, Townsend v. Sain,* 359 U. S. 64 (1959); petition *dismissed* in District Court, *aff'd U. S. ex rel. Townsend v. Sain,* 276 F. (2) 324 (C. A. 7, 1960), *cert. granted, Townsend v. Sain,* 365 U. S. 866 (1961), *rev'd and remanded, Townsend v. Sain,* 372 U. S. 293 (1963); decision of District Court ordering new trial *rev'd, U. S. ex rel. Townsend v. Ogilvie,* 334 F. (2) 837 (C. A. 7, 1964), *cert. den. Townsend v. Ogilvie,* 379 U. S. 984 (1965); motion to allow amendment of petition *denied* in District court, *aff'd, United States ex rel. Townsend v. Ogilvie,* 360 F. (2) 925 (C. A. 7, 1966), *cert. den., Townsend v. Ogilvie,* 385 U. S. 938 (1966).

a jury's verdict or, however unlikely, reveal a shocking disregard by the accused jurors and marshals assigned to safeguard them, of the solemn oaths they made and the responsibilities they accepted.

I will feel better if, when our processes have run their full course, it can be said that James Hoffa and his co-defendants were given no more, but no less, than the concern which today's courts exhibit for the constitutional rights of even the most vicious and obviously guilty felons. In *Sanders v. United States,* 373 U. S. 1 (1963), the United States Supreme Court took occasion to say,

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." 373 U. S. at p. 8.

In my opinion, a remand for an evidentiary hearing would not call for admission of the defendants to bail pending its completion. The initial impression of implausibility made by these extreme charges should preclude such action.

I would remand this matter to the District Court for an evidentiary hearing, limited, of course, to consideration of the charge of jury misconduct.

APPENDIX B.

(Filed Oct. 16, 1967, Carl W. Reuss, Clerk.)

Nos. 16,991, 16,992, 16,993, 16,994.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
James R. Hoffa,
Defendant-Appellant. } No. 16,991.

United States of America,
Plaintiff-Appellee,
vs.
Thomas Ewing Parks,
Defendant-Appellant. } No. 16,992.

United States of America,
Plaintiff-Appellee,
vs.
Larry Campbell,
Defendant-Appellant. } No. 16,993.

United States of America,
Plaintiff-Appellee,
vs.
Ewing King,
Defendant-Appellant. } No. 16,994.

Order Denying Petition for Rehearing.

Before Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

The argument of appellants now appears to focus on alleged bias and hostility of two jurors, expressed prior to the trial, and the claim of error of the District Judge in ruling on the affidavit of bias and prejudice filed against him. The petition for rehearing does not even mention the alleged misconduct of United States Marshals and seven jurors with prostitutes, which was featured in the appellants' brief in chief and which we thought was palpably incredible.

The petition for rehearing asserts that this court "failed to take into consideration the allegations of jury bias and hostility, as expressed by two members of the jury prior to trial and concealed by them during the voir dire examination." This assertion is incorrect as even a cursory examination of our opinion will show. We stated:

> "We also agree with the trial Judge that diligence cannot be inferred in procuring the information that two of the jurors had made statements prior to the trial indicating bias and prejudice.
>
> . . .
>
> "The trial Judge found as a fact . . . that no juror at any time prior to submission of the case discussed the case with anyone or expressed any opinion as to the guilt or innocence of any appellant, or made any comment or expressed any prejudice against any appellant. . . ."
>
> "[N]or did any juror fail to fully and truthfully respond upon his respective voir dire examination; . . . nor did he [the Judge] credit the affidavits of fellow employees of two jurors, pointing out that one of them, after giving an affidavit accusing a juror of perjury on his voir dire examination, had invited the same juror to a social affair at which alleged statements of jury misconduct were made by the juror.
>
> "In our opinion, these findings of fact are supported by substantial evidence and are not clearly

erroneous. In denying the third motion, the District Judge did not abuse his discretion."

The trial Judge had before him when he ruled on the third motion, the voir dire examination of these two jurors in which they swore under oath that they would decide the case solely on the evidence. He also had the sworn statements of the two jurors denying that they had expressed bias or hostility to any of the appellants. He had presided over a long trial and saw the jurors daily. He ruled on the first and second motions for a new trial on newly discovered evidence and the affidavits and counteraffidavits filed in connection therewith. He was certainly very familiar with all aspects of the case. With this experience, the Judge was "exceptionally qualified to pass upon the affidavits." *United States v. Johnson,* 327 U. S. 106, 112.

Moreover, the affidavits submitted by appellants concerning these two jurors indicate that their views with respect to Hoffa and labor unions were notorious. If this were so, that fact could easily have been ascertained when appellants investigated the veniremen prior to the trial to determine whether there was evidence of bias, prejudice or ill will toward any of the defendants (Main case Appendix, p. 455a). Under the circumstances, the Judge could not infer diligence in presenting the alleged newly discovered evidence nearly eighteen months after the conviction.

The claims made with respect to the affidavit of bias and prejudice are answered in our opinion and need not be repeated here.

The petition for rehearing is denied.

Judge O'Sullivan, although adhering to his dissent, concurs in the denial of the petition for rehearing.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX C.

Opinion—Filed Sept. 22, 1965.

The defendants were convicted on March 4, 1964, of willfully endeavoring to influence, intimidate and impede jurors in the discharge of their duties, in violation of the Federal Obstruction of Justice Statute (18 U. S. C., Sec. 1503). Upon appeal the convictions were affirmed by the Court of Appeals by a unanimous opinion filed July 29, 1965. The case is now before this Court upon a motion for a new trial alleging newly discovered evidence and upon a motion filed by the defendant Hoffa, and subsequently joined by the other defendants, seeking to disqualify the undersigned as the presiding judge and alleging bias at the time of the trial. This motion to disqualify is based upon a purported affidavit obtained 18 months after the trial and within a few days after the United States Court of Appeals affirmed the conviction of the defendants. The affidavit purports to be that of a woman who identifies herself as one Marie Monday and who, in further affidavits in support of the motion for new trial, identifies her occupation as that of a prostitute who frequented the rooms of the jurors. The affidavit represents that someone who identified himself as the presiding judge in the trial of the defendant Hoffa, whom she now identifies as such, visited her at the Read House Hotel where the jury was quartered during the course of the trial in January and February 1964 and confided in her that he was biased against the defendant Hoffa.

The Government has filed a motion to strike the motion to disqualify.

The affidavit upon which the motion to disqualify is based is a complete and total fabrication and fraud. The facts are:

(1) The undersigned has never known nor ever been introduced to the person described in the purported affidavit as Marie Monday, nor has the undersigned ever had any conversation with such a person at *any* time or place about *any* subject, including *any* matter relating to the trial of James R. Hoffa or any defendant in this case.

(2) The undersigned was never in nor in the vicinity of the Read House Hotel, Chattanooga, Tennessee, during the entire course of the trial of the case of *United States of America v. James R. Hoffa et al.*, extending from January 20, 1964, through March 6, 1964, and including the date of sentencing upon March 12, 1964, having deliberately avoided going there for any purpose during the said trial in view of the fact that the jury trying the case was quartered and sequestered at the said hotel.

(3) The undersigned has never made the statement "that he was in charge of the Hoffa trial" or that "Hoffa was going to get what was coming to him this time and he was going to see to it that he did" or "don't you worry, he is going to be convicted because he (Wilson) was in charge of it," nor anything bearing any resemblance to such statements to *any* person at *any* time or in *any* place, including the person identified as Marie Monday, the place identified as the Read House Hotel, and the time identified as during the course of the trial of this case.

(4) The undersigned has never held any bias or prejudice nor acted as a result of any bias or prejudice against the defendant James R. Hoffa, nor against any defendant in this case, nor has he held any bias or acted as a result of any bias in favor of the prosecution. Each and every action of the Court is a matter of record in the case and was taken solely on the basis of the evidence and in accordance with the law, irrespective of the party or parties affected thereby. For example, this Court directed a verdict of acquittal for the defendant, James R. Hoffa,

at the conclusion of the evidence upon one count upon which the court deemed that the evidence was insufficient to submit to the jury. The record of the trial and each action of the court has now been carefully and fully reviewed by the United States Court of Appeals and found to be free of error.

The defendants contend, however, that the truth or falsity of the affidavits is irrelevant and cannot be asserted to defeat the motion to disqualify. As unusual as this may seem, this is a correct statement of the present law under 28 U. S. C. 144, upon which the motion to disqualify is based.

This statute provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

In the case of *Berger v. United States,* 255 U. S. 22, 65 L. Ed. 481, 41 S. Ct. 230, with three justices dissenting, the Court held that under the language of the foregoing section, upon the filing of an affidavit of personal bias or prejudice against a judge, the truth or falsity of the facts asserted cannot be passed upon but that, regardless

of whether the judge is in fact biased or prejudiced, he must assume the facts as stated in the affidavit to be true and pass only upon the legal sufficiency of the affidavit and motion. See also *Taylor v. United States,* 179 F. 2d 640; *Refior v. Lansing Drop Forge Company,* 124 F. 2d 440.

However, even though the falsity of an affidavit is not permitted to be asserted as a basis for denying the motion to disqualify, and even though the fact of bias is not required to exist, the statute makes other requirements before a judge is to be declared disqualified. One of these requirements is that "a party may file only one such affidavit in any case." In this case the defendant, James R. Hoffa, filed such an affidavit against Judge Frank Gray under date of December 10, 1963. Although Judge Gray held the affidavit legally insufficient to require his disqualification, he nevertheless withdrew from the case. It was as a consequence of the withdrawal of Judge Gray following the filing of the affidavit against him that the undersigned was designated to try the case. Having heretofore filed one such affidavit, in accordance with the express provisions of the statute, the defendant is not permitted to file a second against another judge. Otherwise, the defendant could file successive motions and affidavits to disqualify each judge designated to try the case and thereby prevent any disposition of his case.

As stated in the case of *Allen v. duPont,* 75 F. Supp. 546 at page 549:

> "If the affidavit filed in this case is to prevail, conceivably every judge in the federal system might in monotonous succession be given the same sort of passport and our judicial procedure be rightly made the subject of ridicule and contempt."

See also *United States v. Buck,* 23 F. Supp. 508, and *Martin v. Texas Indemnity Insurance Co.,* 214 F. Supp. 477. As stated by the Court in the latter case at page 480:

"28 U. S. C. A., Section 144, imposes a bag limit of one judge for a party to disqualify by the character of motion under consideration here."

In the second place, the statute requires that the affidavit be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." In the present case the motion was filed, as mentioned above, 18 months after the trial of the case and within a few days after the conviction of the defendant had been affirmed upon appeal.

In the case of *Ex Parte American Steel Barrel Co.*, 230 U. S. 35, 57 L. Ed. 1379, 33 S. Ct. 1007, the Court held that Section 21 of the Judicial Code (the forerunner of the present Section 144) "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than 10 days before the beginning of the term."

This was reaffirmed in the case of *Berger v. United States*, 255 U. S. 22, 65 L. Ed. 481, 41 S. Ct. 230, and the following language:

"The section permits only the affidavit of a party and *Ex Parte American Steel Barrel Co., supra,* decides that it must be based upon facts antedating the trial, not those occurring during the trial."

See also *Knapp v. Kinsey* (C. C. A. 6, 1956), 232 F. 2d 458, wherein the Court held that Section 144, Title 28

U. S. C., is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial.

In the case of *Ex Parte Glasgow,* 195 F. 780, the Court held that Section 21 of the Judicial Code (the forerunner of Section 144) did not authorize an affidavit to disqualify a judge from ruling on motions in arrest and for new trial. See also *Taylor v. United States* (C. C. A. 9, 1950), 179 F. 2d 640, wherein the Court held that an affidavit of bias and prejudice filed in the district court on a motion to set aside judgment and sentence would not be timely.

In this case there is a total lack of showing of any facts upon which diligence might be inferred. The same diligence which produced the affidavit within a few days after affirmance of the defendants' convictions upon appeal could doubtless have produced it at any prior time. That the existence of prostitutes as a source of affidavits had occurred to the defendants at a much earlier stage in these proceedings is shown in the affidavits upon the original motion for a new trial wherein deputy marshals were charged with misconduct.

A further defect in the motion to disqualify is the failure of the motion to be accompanied by a proper certificate of good faith executed by counsel of record. In this the Court is not referring to the issue of fact that may exist as to the truth or falsity of the certify of good faith, although the existence of an issue of fact upon the certificate has never been ruled upon by the appellate courts. (*Berger v. United States,* supra, was limited to the non-contestability of the affidavit of bias.) Rather, the Court is referring to the fact that counsel of record for the defendant Hoffa upon the trial of this case was Attorney Harry Berke, and that Mr. Berke has not joined in the certificate of good faith on behalf of the defendant Hoffa stating his belief in the truth of the affidavit of

Marie Monday. James Haggerty, Sr., an attorney of Detroit, Michigan, has filed the certificate of good faith along with Harold E. Brown, an attorney of Chattanooga, Tennessee. Mr. Haggerty is not a member of the bar of this Court. Mr. Brown, while a member of the bar of this Court, was not an attorney of record for the defendant Hoffa upon the trial of the case, but rather was the attorney of record for the defendant King. The omission of the certificate of good faith upon the part of counsel of record for the defendant Hoffa at the time of the trial is a significant omission.

The requirement that local counsel of record in the trial of the case execute the certificate of good faith is not a technical one. Rather, it is a matter of substance. Counsel not admitted to practice in this Court but appearing only specially in one case for one defendant, is obviously not subject to the same restraint as an attorney who regularly practices before the Court and would not be as liable to use the care and restraint of an attorney regularly practicing in the Court. The present case is a classic example of this fact. Mr. Haggerty has filed a telegram in which he authorizes an attorney in Washington, D. C., who has never been an attorney of record in this case, as follows:

> "You Are Hereby Authorized to Affix My Signature on All Papers and Documents in Connection With the Case of the United States Versus James R. Hoffa et al. in the United States District Court in Chattanooga, Tennessee."

Even in this electronic era, practice by wire has yet to be fully accepted by the Courts as a substitute for personal presence.

As with counsel not admitted, likewise so it is with counsel, who, though admitted to practice in this court was not counsel of record at the time of the trial but who

rather was hired specifically to file the certificate of good faith. It is obvious that such counsel will not be in position to make as meaningful a certificate of good faith as would counsel of record in the trial and further would not be as likely to use the care and restraint in certifying good faith as would otherwise be the case were his employment not directly related to the filing of the certificate, and that only.

In the case of *Currin v. Nourse* (C. C. A. 8, 1934), 74 F. 2d 273 at page 275, the Court stated: ". . . The section of the applicable statute (section 21, Judicial Code, title 26, USCA, Sec. 25) provides that 'no such affidavit [an affidavit of bias and prejudice] shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.' The phrase 'counsel of record' in the statute means an attorney at law admitted to the bar in the case. One who is not a member of the bar cannot be counsel of record even though the record on its face may show he had undertaken to appear as counsel. Since Mr. Payne was not on the date of the filing of either of the affidavits a member of the bar of the court, he could not then or at any earlier time have been counsel of record in the case for either of the affiants. The purpose of the provision of the statute requiring certificate of good faith by counsel of record is that the court may be assured that the affidavit is made in good faith through the certificate to that effect made by one who is a sworn officer of the court, regularly admitted as an attorney to practice at the bar of the court. The requirement is not technical.

It is one of the essential requirements of the statute. As the affidavits were not certified to be made in good faith by counsel of record, the motions to strike them for insufficiency in law were properly sustained and Judge Otis 'having,' as he stated, 'no consciousness whatever of any

prejudice against any of the parties or in favor of any,' the duty to continue with the hearing in the matter of confirmation of the sale remained upon Judge Otis. *Klose v. United States* (C. C. A. 8), 49 F. (2d) 177; *Cuddy v. Otis* (C. C. A. 8), 33 F. (2d) 577; *Morse v. Lewis* (C. C. A. 4), 54 F. (2d) 1027; *Saunders v. Piggly Wiggly Corp.* (D. C.), 1 F. (2d) 582; *Benedict v. Seiberling* (D. C.), 17 F. (2d) 831; *Ex Parte Fairbank Company* (D. C.), 194 F. 978."

See also the cases of *Mitchell v. United States,* 126 F. 2d 550, at page 552; *Beland v. United States,* 117 F. 2d 958, at page 960; *United States v. Garden Homes, Inc.,* 113 F. Supp. 415, at page 418; *United States v. Onan,* 190 F. 2d 1, at page 6; and *Freed v. Inland Empire Insurance Co.,* 174 F. Supp. 458, which stand for the proposition that the requirement of the statute is founded on the assumption that a member of the bar will not indulge in reckless disregard of the truth and therefore attest to the good faith and belief of affiant and that one may not be counsel of record unless a member of the bar of the Court before which appearance is made.

Counsel of record has an obligation to the Court as well as to his client, and a public duty to aid the administration of justice, to uphold the dignity of the Court and respect its authority.

United States v. Gilboy, 162 F. Supp. 384; *United States v. Onan,* 190 F. 2d 1; *Bishop v. United States,* 16 F. 2d 410.

With respect to the Motions and affidavits filed upon behalf of each of the defendants other than defendant Hoffa, there is no allegation of any bias or prejudice personal to any defendant other than defendant Hoffa. The affidavits of bias filed on behalf of the defendants Campbell, Parks, and King merely adopt by reference the affi-

davit of Marie Monday filed in the Hoffa Motion. These affidavits do not purport to set forth any alleged remarks of the Court with respect to these three defendants. The statute requires that the affidavit of bias show that the Judge "has a personal bias or prejudice either against him or in favor of any adverse party." The affidavits here involved do not specify any bias or prejudice of this Court personal to the defendants Campbell, Parks, and King, even when the affidavits are held to be incontestable for falsity. As stated by the Court in *Price v. Johnson,* 125 F. 2d 806, at 811:

> ". . . The plain purpose of the statute 'was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against suitor making the affidavit or in favor of his opponent.' "

See also *Knapp v. Kinsey* (C. C. A. 6, 1956), 232 F. 2d 458, at 466; *Hurd v. Letts,* 152 F. 2d 121; *Eisler v. United States,* 170 F. 2d 273, at page 278; *Johnson v. United States,* 35 F. 2d 355; and *United States v. Gilboy,* 162 F. Supp. 384.

Finally, although since this Court is the object of the attempted defamation here sought to be practiced, it does not cast its opinion denying the motion to disqualify upon this ground, the law is well settled that the affidavit of bias and prejudice must be sufficient to fairly convince a sane and reasonable mind that such attitudes on the part of the attacked judge do exist. *Fieldcrest Dairies v. City of Chicago,* 27 F. Supp. 258. It is inconceivable that a sane and reasonable mind could believe that this Court during the course of this trial would meet in a public

facility with a self-admitted prostitute who was a total stranger and make such expressions as she has sworn to. Surely a judge of the United States of America cannot be prevented by such patent perjury from performing his duty in accordance with the law. Certainly this United States Judge, by such attempted defamation, will neither be deterred from doing his duty in accordance with the law, nor will he be pressured into doing anything but his duty in accordance with the law. Each defendant will continue to receive every right accorded him under the law.

As stated in the case of *In re Union Leader Corp.* (C. C. A. 1, 1951), 292 F. 2d 381, cert. den. 368 U. S. 927:

> "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. See *Tucker v. Kerner*, 7 Cir. 1950, 186 F. 2d 79, 85; Sanders v. Allen, D. C. S. C. Cal. 1944, 58 F. Supp 417, 420, appeal dismissed, 9 Cir. 1945, 152 F. 2d 534."

The Motion to disqualify filed on behalf of each defendant will be overruled and the motion to strike the same sustained.

An order will enter accordingly.

Frank W. Wilson,
United States Judge.

APPENDIX D.

Opinion—Filed Nov. 12, 1965.

The defendants were indicted under the Federal Obstruction of Justice Statute (18 U. S. C. 1503) upon May 9, 1963, and charged with willfully endeavoring to influence, intimidate, and impede jurors in the discharge of their duties. After lengthy proceedings including two petitions by the defendants to the Court of Appeals for mandamus, each of which petitions was denied, the case went to trial upon January 20, 1964. After seven weeks of trial, the jury returned a verdict of guilty against the defendants, Hoffa, Parks, Campbell and King, and acquitted two other co-defendants.

The case is now before this Court upon the defendants' motion for new trial, the present motion, based upon alleged newly discovered evidence, having been filed upon September 1, 1965. This is the third motion for new trial filed by the defendants, and the second motion based upon alleged newly discovered evidence. The original motion for new trial, asserting 92 grounds, was filed upon March 10, 1964. This motion was overruled by opinion of the Court filed April 8, 1964, and at the time that it was set for argument in the Court of Appeals, the defendants filed their second motion for new trial, this motion being based upon alleged newly discovered evidence. This second motion was initially filed in the Court of Appeals and a stay sought in the original appeal pending its disposition, but the stay was denied. This Court overruled the second motion for new trial by an opinion filed April 8, 1965, and the appeal is presently pending in the Court of Appeals. In the meantime, the Court of Appeals affirmed the conviction of the defendants upon the initial appeal upon July 29, 1965. Shortly thereafter the defendants

filed the present motion for new trial upon September 1, 1965, being the third such motion filed and the second motion to be based upon alleged newly discovered evidence.

Along with the present motion for new trial, the defendants filed a motion seeking to disqualify the undersigned as the presiding judge and alleging bias at the time of the trial as the grounds therefor. This Court overruled the motion to disqualify for the reasons set forth in the opinion filed September 22, 1965. The defendants have now filed a further motion to disqualify the undersigned as the presiding judge and a motion to stay the entry of an order upon the former motion for disqualification pending reconsideration of the initial motion to disqualify.

Taking up the defendants' motion to reconsider the former motion for disqualification, the Court is of the opinion that this motion should be overruled. The motion to reconsider raises no matters that were not fully covered in the opinion of this Court filed September 22, 1965.

Considering next the defendants' motion for disqualification filed September 27, 1965, this motion does not purport to be based upon alleged bias, nor to be brought in accordance with 28 U. S. C., Sec. 144, but contends rather that by reason of the allegations of bias in the new trial motion, the undersigned should disqualify himself under 28 U. S. C., Sec. 455, as having an interest in or being a witness to issues of fact raised in the motion for new trial. Thus, by allegations of bias in the motion for new trial, the defendants seek to accomplish what they are not entitled to accomplish upon a motion to disqualify for alleged bias under 28 U. S. C., Sec. 144, the statute specifically providing for the disqualification of a trial judge for alleged bias. Obviously, such an evasion of the law cannot thus be accomplished, nor can the administration of

justice thus be thwarted. If the defendants could by the mere allegation of bias in the motion for new trial accomplish the removal of a trial judge, when no grounds exist for his disqualification under the statute providing for removal for alleged bias, the defendants could not only evade the law relating to the disqualification of a judge for bias, but could by the simple expedient of including in the motion for new trial allegations of bias against each judge scheduled or designated to hear the motion accomplish the removal of every judge, both trial and appellate, in the federal court system, and thereby prevent any disposition of his motion from ever being made.

Furthermore, an allegation of bias upon the part of a trial judge first asserted in a motion for new trial does not, as a matter of law, assert any ground for new trial nor raise any issue of fact. The issue on a motion for new trial is whether error was committed in the trial of the case. In this case the trial record has now been fully and carefully reviewed by the appellate court and found to be without error. An allegation of bias made after completion of the trial and not reflected in any error made in the trial of the case cannot, as a matter of law constitute a ground for new trial. Thus, an allegation of bias in a motion for new trial raises no issue of fact upon which the trial judge might be called as a witness nor be disqualified under 28 U. S. C., Sec. 455. The defendants' motion for disqualification filed September 27, 1965, will accordingly be overruled.

Turning the attention of the Court next to the motion for new trial, as noted above, this motion purports to be based upon newly discovered evidence and is made in accordance with Rule 33 of the Federal Rules of Criminal Procedure, which permits the filing of such motions within two years after the trial. In view of the fact that this case is now pending upon petition for certiorari to the

United States Supreme Court from the action of the Court of Appeals in affirming the conviction of the defendants, as well as pending in the Court of Appeals upon the defendants' appeal from the action of this Court overruling the second motion for new trial, this Court would be without jurisdiction to grant the motion for new trial except upon remand of the case. However, the trial court does have jurisdiction to hear the motion and determine whether a request for remand should be made, even though the case is pending upon appeal.

The present motion sets forth three principal grounds as the basis for the motion. It is first contended that the defendants have obtained newly discovered evidence of misconduct upon the part of the United States Marshals in their care, custody and contact with the jury during the trial of the case. It is next contended that the defendants have obtained newly discovered evidence of misconduct upon the part of jurors, both before and during the trial of the case. Finally, it is contended that the defendants have obtained newly discovered evidence of bias upon the part of the trial judge alleged to have existed at the time of the trial. As noted above, this latter ground does not as a matter of law constitute a ground for new trial, so that it need not further be considered. Much that was said by the Court in its opinion upon the motion to disqualify would be relevant here, however, including the lack of any showing of diligence upon the part of the defendants.

The allegations of misconduct made against the marshals and jurors, generally stated, are that the marshals provided and the jurors used the services of prostitutes during the trial, that the jurors were improperly provided with alcoholic beverages and other favors during the trial, and that improper communications and statements of prejudice against or guilt on the part of the defendant Hoffa were made to and by the jurors both before and

during the trial. The defendants seek to support these allegations of misconduct upon the part of the marshals and jurors by the affidavits of four women who identified themselves as prostitutes, two men who identify themselves as procurers, and six men who identify themselves as employees at the plant where two jurors work. The remaining affidavits filed by the defendants are those of the defendant Hoffa, one of his assistants, and two of his attorneys. These affidavits relate to when and how the affidavits of the prostitutes, the procurers and the fellow employees were obtained. Thus, the alleged newly discovered evidence proffered by the defendants does not relate to the guilt or innocence of the defendants, but rather purports to show that the trial was at the hands of immoral and prejudiced persons, and not good and lawful men and women jurors.

In response to the defendants' motion, the Government has filed a large number of affidavits, including the affidavits of eleven of the twelve trial jurors (one juror being presently critically ill), each of the four alternate jurors, the marshal and each of the deputy marshals who assisted in the care and custody of the jury during the trial or had any contact with the jury. These affidavits specifically and categorically deny each and every act of alleged misconduct, deny any knowlege of or contact with any prostitute, deny the presence of any unauthorized person in the quarters where the jury was sequestered or any communication with any such persons, deny any statements prejudicial to the defendant either made by any juror or in the presence of any juror at any time and deny that any juror had formed or expressed any opinion prejudicial to the defendant prior to the deliberations of the jury.

Upon the basis of the allegations in their motion and supporting affidavits, these defendants seek to be permitted to produce and examine witnesses. It appears,

however, that the motion can properly be decided upon the present record, and this for two reasons. In the first place, it appears conclusively on the face of the record that the defendants' motion is legally insufficient to warrant the granting of a new trial. The law is clear that to support a motion for new trial on the ground of newly discovered evidence, the evidence must not only be newly discovered, but it must be made to appear that the failure to discover it sooner was not due to a lack of due diligence upon the part of the defendants. *Pitts v. United States,* 263 F. 2d 808 (C. A. Alaska, 1959), cert. denied 360 U. S. 919, rehearing denied 361 U. S. 857; *Fernandez v. United States,* 329 F. 2d 899, 904 (C. A. 9), cert. denied 379 U. S. 832; *Ferina v. United States,* 302 F. 2d 95, 112-114 (C. A. 8), cert. denied, *sub nom. Cardarella v. United States,* 371 U. S. 819; *Mills v. United States,* 281 F. 2d 736, 739 (C. A. 4); *United States v. Costello,* 255 F. 2d 876, 879-881 (C. A. 2), cert. denied, 357 U. S. 937. Not only were many of the allegations of misconduct now asserted to be newly discovered raised by the defendants in their original motion for new trial, but there is a total lack of showing of any facts upon which diligence might be inferred.

In their original motion for new trial, the defendants alleged misconduct upon the part of marshals and jurors of much the same nature as is now alleged. The action of this Court in finding such charges in the original motion wholly without merit has now been affirmed by the Court of Appeals. Furthermore, from the record upon that motion it appeared that bellboys were offered or received large sums of money to give affidavits charging misconduct upon the part of marshals and jurors. Also at that time one lady juror was charged with making statements in Chattanooga, Tennessee, with reference to jury misconduct at a time when she was in fact in the State of Florida.

With regard to diligence, the present record is totally devoid of any showing that the evidence now presented as newly discovered could not have been discovered and produced at any time the defendants chose to do so. From the defendants' own affidavits, it appears that O'Brien, an assistant to defendant Hoffa, came to Chattanooga immediately after the Court of Appeals had affirmed the conviction of the defendants and within a matter of a few days had located and taken to the defendants' attorneys the four prostitutes, the two procurers, and the six employees whose affidavits are now alleged to constitute newly discovered evidence of misconduct upon the part of the marshals and jurors. Although the affidavit of the defendant Hoffa and one of his attorneys indicates that each heard "rumors" of jury misconduct at the time the verdict was returned, there is no allegation that they ever attempted to contact the present witnesses until 17 months after the trial and until the Court of Appeals had affirmed the convictions. There is likewise no explanation of how they were able to find the witnesses so promptly after the conviction was affirmed. The Court can only conclude that the diligence displayed by the defendant Hoffa's assistant, O'Brien, immediately after the convictions were affirmed could have located and produced the same witnesses at any earlier time that the defendants may have chosen to send O'Brien to Chattanooga for that purpose.

Wholly aside from whether the present motion alleges any "newly discovered evidence" or whether due diligence is shown in procuring such evidence, the Court can and will however decide the factual issues raised by the present motion for new trial on the basis of the affidavits and counter-affidavits filed herein. The law is well settled that a motion for new trial based upon newly discovered evidence may be decided by the Court upon the affidavits and counter-affidavits filed in support and opposition to the motion. *United States v. Johnson*, 327 U. S. 106; *United*

States v. Astore, 309 F. 2d 144 (C. A. 2); *Lyles v. United States*, 272 F. 2d 910 (C. A. 5); *Stern v. United States*, 260 F. 2d 365 (C. A. 6); *United States v. Troche*, 213 F. 2d 401 (C. A. 2); *Ewing v. United States*, 135 F. 2d 633 (C. A., D. C.), cert. denied 318 U. S. 776; *Hillman v. United States*, 192 F. 264 (C. A. 9), cert. denied 225 U. S. 699; *United States v. Crowder*, ... F. 2d ... (C. A. 6, #15,584, Sept. 30, 1965).

Accordingly, upon the basis of the affidavits and counter-affidavits filed with regard to the present motion for new trial, the Court makes the following findings of fact:

(1) That no juror nor alternate juror who participated in the trial of this case was at any time furnished a prostitute by any United States Marshal or Deputy United States Marshal, nor did any juror at any time during the trial of this case have any contact with or engage in any conversation with any prostitute, including Patsy Jo Harris, Catherine Johnson, Troyce Dean Henry, Bobbie Ann Sells and Marie Monday.

(2) That no United States Marshal or Deputy United States Marshal at any time during the trial of this case made any remark prejudicial to the defendant to or in the presence of any juror.

(3) That no United States Marshal nor Deputy United States Marshal provided any juror with alcoholic beverages or bestowed other gifts or favors upon any juror, nor did anything calculated to influence the decision of the case by the jury either in favor of or against any party in the case.

(4) That no unauthorized separation of the jury occurred during the trial of the case and that at no time during the trial of this case was any juror out of the presence of a United States Marshal or Deputy United States Marshal duly sworn to have custody of the said jury.

(5) That no juror at any time prior to the case being submitted to the jury for decision discussed the evidence in this case with anyone or expressed any opinion as to the guilt or innocence of any defendant, nor did any juror make any comment or express any prejudice against any defendant in the case prior to the rendition of the verdict, nor was any statement or comment prejudicial to any defendant made by any third party to or in the presence of any juror during the trial of the case.

(6) That neither jurors Starnes, McConnell, nor Kilgore expressed any prejudice against or opinion as to the guilt or innocence of any defendant in this case prior to being selected upon the jury, nor did any such juror fail to fully and truthfully respond upon his respective voir dire examination.

(7) That the United States Marshals and Deputy United States Marshals at all times while in attendance upon the jury and each juror at all times during the course of his or her jury services conducted himself or herself in accordance with the instructions of the Court, which instructions were given in open court and the same appear of record in the trial of the case.

The foregoing findings of fact are based upon and supported by the unequivocal and categorical affidavits of each of the fifteen jurors and the affidavits of each and every United States Marshal or Deputy United States Marshal who had any custody of or contact with any juror during the trial of this case. They are not refuted by the signatures upon the affidavits of four women who admit selling their bodies, if not their signatures, for immoral purposes for $20.00. Neither are they refuted by the affidavits of two procurers for prostitutes who do not purport to identify any juror as having engaged in any misconduct. Neither are they refuted by the affidavits of fellow employees of two jurors who identify themselves

as union sympathizers and believe such jurors to be hostile to unions. In this regard, the Court cannot overlook the fact that immediately after the employee, Isenhower, gave an affidavit to the defendants, which was represented as being freely and voluntarily given, accusing the juror Kilgore of perjury on his voir dire, the same employee Isenhower, invited the said juror to a social affair at which alleged statements of jury misconduct were made by the juror, which alleged statements form the basis of the affidavits promptly filed with the defendants by the employees, Isenhower, Horton and Bull. Such diligence, if not deviousness, in producing evidence would hardly be attributed to a witness who claims to be totally disinterested.

For the reasons hereinabove set forth, the Court is of the opinion that the defendants' motion for new trial is without merit. No request for remand of the case will be made. An order will enter accordingly. Likewise, in accordance with this opinion and in accordance with the opinion of the Court entered upon September 22, 1965, orders will enter overruling both motions of the defendants to disqualify the undersigned as the trial judge in this case and overruling the defendants' motion to stay entry of an order accordingly.

Enter:

Frank W. Wilson,
United States District Judge.

APPENDIX E.

(Filed Sep. 14, 1967, Carl W. Reuss, Clerk.)

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
James R. Hoffa,
Defendant-Appellant.
No. 16,991.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $ . . .

A True Copy.
Attest:

.....
Carl W. Reuss, Clerk.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
Thomas Ewing Parks,
Defendant-Appellant.
No. 16,992.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $ . . .

A True Copy.
Attest:
.....
Carl W. Reuss, Clerk.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,

vs.

Larry Campbell,
Defendant-Appellant.

No. 16,993.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $. . . .

A True Copy.
Attest:

.....
Carl W. Reuss, Clerk.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
vs.
Ewing King,
Defendant-Appellant.
No. 16,994.

Before: Weick, Chief Judge, O'Sullivan, Circuit Judge, and Cecil, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:
Costs: None
Filing fee .....$ . . .
Printing .....$ . . .

Total $ . . .

A True Copy.
Attest:

.....
Carl W. Reuss, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 912

JAMES R. HOFFA, LARRY CAMPBELL, THOMAS EWING PARKS, AND EWING KING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 382 F. 2d 856. The opinion of the court of appeals denying a petition for rehearing (Pet. App. B) is not yet reported. The opinions of the district court (Pet. App. C and D) are reported at 245 F. Supp. 772 and 247 F. Supp. 692.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1967. A petition for rehearing was denied on October 16, 1967. On November 2, 1967, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to December 15, 1967, and on

December 13, 1967, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' motions for disqualification of the trial judge were properly denied.

2. Whether petitioners' motion for a new trial on grounds of newly discovered evidence, alleging misconduct by jurors and marshals, should have been denied as dilatory.

3. Whether, in the circumstances of this case, petitioners were entitled to a hearing.

STATEMENT

1. After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted of wilfully endeavoring to influence, intimidate and impede jurors in the discharge of their duties, in violation of 18 U.S.C. 1503. On March 12, 1964, petitioner Hoffa, who had been convicted on two of five counts, was sentenced to four years' imprisonment and a fine of $5,000 on each count, the sentences to run consecutively; petitioners Parks, Campbell, and King, each of whom had been convicted on one count, were sentenced to three years' imprisonment. The court of appeals affirmed, *United States* v. *Hoffa*, 349 F. 2d 20 (C.A. 6), as did this Court, *Hoffa* v. *United States*, 385 U.S. 293. An initial motion for a new trial, filed six days after the verdict, raising allegations that jurors and marshals were guilty of misconduct, was denied by the district court and by the court of appeals in its opinion on

July 29, 1965, affirming petitioners' conviction. 349 F. 2d 20, 50. A second motion for a new trial, filed during the pendency of the direct appeal, based on allegations of newly discovered evidence as to the placing of an informer in the midst of the defense and the suppression of evidence by the government, was denied. *United States* v. *Hoffa*, 247 F. Supp. 692 (E.D. Tenn.), affirmed, 376 F. 2d 1020 (C.A. 6), certiorari denied, No. 432, O.T. 1967, October 9, 1967. Petitioners' third motion for a new trial, filed September 1, 1965, is the one involved here.[1]

2. In order to place petitioners' present motion in proper context, it is necessary to examine in some detail the allegations of the first motion for a new trial, which raised similar claims. That motion alleged that jurors mingled with other citizens and fraternized with marshals; that the marshals supplied intoxicating liquors to jurors, drank with and entertained the jurors; and that the jury was guilty of misconduct and of considering matters extraneous to the evidence (X App. 289a–304a).[2] Various affidavits were attached to the motion for a new trial. These included one by

[1] A fourth motion for a new trial, filed February 28, 1967, alleging newly discovered evidence as to electronic surveillance by government agents of petitioners' counsel during the trial, has been denied by the district court, 268 F. Supp. 732 (E.D. Tenn.), and is now before the court of appeals.

[2] "X App.", the form of citation adopted by the parties below, refers to the record appendices in the main case. Page citations followed by "a" refer to petitioners' main case appendix; those followed by "b", to the government's appendix in the main case. "App." refers to petitioners' appendix in the court of appeals on the present motion, a copy of which we are lodging with the Clerk of this Court.

Virgil Culpepper, a bellman at the Read House Hotel where the jurors were quartered, who claimed that he heard the jurors mention Hoffa's name, that considerable whiskey was taken up to the jurors, and that he could tell that there was a lot of drinking going on (X App. 307a–308a). Seymour Ball, a relief bell captain at the Read House Hotel, asserted in an affidavit that several intoxicated persons were taken to the floor where the jury was sequestered and that he saw martini mix and beer sent to that floor (X App. 312a–313a). Ezell Ervons, a porter at the Read House Hotel, signed an affidavit claiming that he once got a girl for a marshal and let them use a room, and that one of the marshals ordered a pint of whiskey which Ervons delivered (X App. 309a–310a). An affidavit by one William Narrimore alleged that in a conversation on March 10, 1965, with Mrs. Emolene Akers, one of the jurors, she said that prior to the verdict she and other jurors were discussing Hoffa in a hallway and a marshal told them not to talk about the subject (X App. 309a).[3]

In response to these claims, the government filed affidavits of jurors denying any misconduct (X App. 452b–457b). Mrs. Akers not only denied the conversation attributed to her by Narrimore, but stated that on its purported date she was not in Tennessee but was on the way to Florida (X App. 465b–466b). The government also submitted an affidavit by George

[3] An affidavit by William Buffalino (see X App. 62a) stated that after the verdict he conducted an investigation which disclosed outside visits by jurors and discussion of irrelevant material in arriving at a verdict.

Rorex, the head bellman at the Read House Hotel, to the effect that Seymour Ball had informed him that Ball and one Hipps (who was subsequently killed in an accident) had been offered $200 to sign an affidavit concerning the marshals and jurors, and that Hipps had accepted $200 for such affidavit (X App. 467b). Anthony Bradford, a bellman at the Read House Hotel, stated in an affidavit that he had not seen anything improper; that Seymour Ball had told him that he could make $500 if he would sign some kind of statement; and that later Ball showed him $200 and said that he was to get $300 more for a statement he had given (X App. 468–469b).[4]

3. In connection with the present motion for a new trial, which in part reiterates the earlier allegations of misconduct by jurors and marshals, petitioner Hoffa filed an affidavit stating that, after the verdict, he immediately sent investigators to Chattanooga, Tennessee, to get proof of rumored misconduct and bias on the part of jurors (App. 55a–56a). Charles O'Brien, one of the investigators, alleged that "within days after the verdict was returned * * * on March 4, 1964," he was "assigned" to investigate misconduct of the jurors; and that some affidavits were then filed, but that thereafter persons became "fearful" (App. 49a–50a). O'Brien said he obtained proof of juror

[4] The trial court found from the affidavits that the marshals and jurors at all relevant times conducted themselves in accordance with the instructions of the court and that the verdict was not the result of any misconduct (X App. 328a–335a). As previously indicated, this ruling was affirmed on appeal, 349 F. 2d 20, 50 (C.A. 6), and certiorari was not sought on this issue.

bias in August 1965, and on or about August 14, 1965, learned for the first time of misconduct of jurors and marshals as set forth in the affidavits of various women (App. 50a–51a).

The same Virgil Culpepper who had supplied an affidavit used in support of the first motion for a new trial (*supra*, p. 4) furnished a new affidavit in which he claimed to have had "several requests for girls" and that "on several occasions, he called a girl named Marie and a girl named Bobbie to come to the [Read House Hotel]" (App. 36a). Petitioners filed an affidavit of one Robert Bigoms (App. 37a–38a), who stated that he knew some of the bellboys at the Read House Hotel (including Ball and Culpepper who had given affidavits in support of the first motion for a new trial), and that during the period of the trial he sent "Patsy" and "Bobbie" to the Read House Hotel in response to requests of bellboys there to supply women for guests. Also filed are affidavits of prostitutes Patsy Jo Harris, Troyce Dean Henry, Bobbie Ann Sells, and Marie Monday, who made charges of misconduct against deputy marshals and almost all of the male jurors and alternates (App. 13a–33a, 105a).[5] All such allegations were categorically denied by the jurors and marshals in affidavits filed by the government (App. 138a–257a).

[5] As noted by petitioners (Pet. 7, fn. 2), Patsy Jo Harris has been convicted of perjury by reason of her testimony before a federal grand jury that she had engaged in sexual intercourse with several of the jurors. Bobbie Ann Sells has been found a juvenile delinquent in federal court on a charge of obstruction of justice for causing her affidavit to be filed.

Petitioners' investigator, Charles O'Brien, stated in an affidavit that in August 1965 he obtained proof that jurors Starnes and Kilgore had expressed prejudice against petitioner Hoffa prior to and after the trial (App. 49a–50a). Affidavits were filed by men who worked at the company where Starnes and Kilgore were employed alleging that, prior to trial, the two jurors had said that Hoffa should be convicted. One Isenhower also stated that at a party on August 12, 1965, Kilgore said that during the trial the jurors had whiskey and women, secured by the marshals (App. 38a–49a, 106a–107a). These allegations were denied by Starnes (App. 165a–167a) and Kilgore (App. 156a–159a). Kilgore also denied the statements purportedly made at the party, to which he had been invited by Isenhower, after Isenhower made his first affidavit on behalf of petitioners (App. 159a, 41a, 45a).[6]

4. With the motion for a new trial, petitioners filed an affidavit under 28 U.S.C. 144 to disqualify the trial judge (Judge Frank W. Wilson) on grounds of personal bias against petitioner Hoffa (App. 89a–90a).[7] Attached to the affidavit of disqualification was the affidavit of Marie Monday (App. 91a–93a, 105a), one of the prostitutes who supplied affidavits used in support of the new trial motion. She alleged that during the course of the Hoffa trial, in January or early February 1964, she met Judge Wilson, who told her that

[6] Isenhower furnished three affidavits in support of the motion (App. 40a–41a, 44a–45a, and 106a–107a).

[7] Prior to trial petitioners had filed an affidavit of bias and prejudice under the same statute against Judge Gray (X App. 17a). On December 12, 1963, Judge Gray ordered the affidavit stricken but recused himself (X App. 18a, 312b–318b).

"Hoffa was going to get what was coming to him"; that on a "subsequent occasion" she met the same Judge Wilson, who assured her that Hoffa was "going to be convicted" because he (Judge Wilson) was "in charge of it."[8]

The district judge on September 22, 1965, denied the motion to disqualify himself, holding that, under the applicable statute the affidavit was not timely filed, was not accompanied by a proper certificate of good faith executed by counsel of record, and was the second such motion to be filed by petitioners in the case (the statute permitting only one such motion) (Pet. App. C). In the course of his opinion Judge Wilson categorically denied the allegations of the prostitute Marie Monday, terming them "patent perjury" (Pet. App. C, 42; see also Pet. App. C, 32–34). Following the judge's opinion, petitioners filed a second motion for disqualification of the judge, under 28 U.S.C. 455, alleging that his labeling of Marie Monday's affidavit as "patent perjury" showed that he had prejudged the issues relating to the motion for a new trial, and that the judge was a "material witness" (App. 133a–138a).

5. On November 12, 1965, Judge Wilson denied the motion for a new trial on the basis of the affidavits filed, finding that the evidence relied on by petitioners was not "newly discovered" and that none of the misconduct asserted had occurred (Pet. App. D).

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[8] Government counsel have represented to the district court, in a pre-trial conference relating to petitioners' fourth motion for a new trial, that Marie Monday has recanted her affidavit. (See Pet. p. 7, fn. 3).

In addition the court denied the second motion for disqualification, on the grounds that it sought to accomplish indirectly what petitioners had failed to accomplish on the first such motion, and that the judge was not a witness to issues of fact raised in the motion for a new trial (Pet. App. D, 44–45).

The court of appeals affirmed the various rulings of the district court, one judge dissenting in part on the question whether petitioners were entitled to a hearing on their motion for a new trial (Pet. App. A). A petition for rehearing was subsequently denied, with a further opinion (Pet. App. B).

ARGUMENT

1. Petitioners' motions for disqualification of the trial judge were properly denied.

(a) The initial motion to disqualify Judge Wilson (under 28 U.S.C. 144) was the second such motion in the case, petitioners having previously filed a motion under the same statute to disqualify Judge Gray, who denied the motion but recused himself. The statute specifically provides that "[a] party may file only one * * * affidavit [under this section] in any case." 28 U.S.C. 144 (set forth at Pet. 3). This "clear and plain" language (Pet. App. A, 8) has been held to preclude a second motion. *Martin* v. *Texas Indemnity Insurance Company*, 214 F. Supp. 477 (N.D. Texas), certiorari denied, 377 U.S. 971. As the court of appeals held (Pet. App. A, 8), it is the clear intent of the statute that a second motion should be precluded whether or not the first motion was technically successful.

Moreover the motion was also properly denied because of the failure to meet the statutory requirements that the affidavit be "accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. 144. Mr. Harry Berke, the only trial counsel of record for petitioner Hoffa who was also a member of the bar of the district court, had withdrawn from the case and did not sign the certificate. As the courts below held, the requirement that the affidavit be signed by counsel of record is a substantive one, designed to protect the district judges, who are forbidden to inquire into the truth of the facts alleged in the affidavit. *Currin* v. *Nourse,* 74 F. 2d 273 (C.A. 8), certiorari denied, 294 U.S. 729; see *Berger* v. *United States,* 255 U.S. 22. Non-compliance with that requirement was a fatal defect here.

The affidavit was further insufficient for the reason that it did not show "good cause" for failure to file the affidavit within "ten days before the beginning of the term at which the proceeding is to be heard", as the statute requires. 28 U.S.C. 144. The clear inference from the affidavits is that the information of Marie Monday was available to petitioners long before the filing of the present motion (see Pet. App. A, 5–6; Pet. App. C, 37).

Since the reasons for denying the motion for disqualification rested on the failure to meet the conditions established by the statute and did not involve a ruling on the merits of the underlying charges, there was nothing improper in Judge Wilson's denial of the motion.

(b) Petitioners' second motion for disqualification, under 28 U.S.C. 455, was also properly denied. The attempt to disqualify the judge on the basis of his denial of petitioners' first such motion was a transparent effort to thwart the administration of justice, which the courts below correctly refused to sanction. It is settled that a judge is as much under an obligation not to disqualify himself without occasion as he is to disqualify himself when circumstances so require—"an obligation especially strong in a case like the present where the request for disqualification was not made at the threshold of the litigation and the judge has acquired a valuable background of experience." *Rosen* v. *Sugarman*, 357 F. 2d 794, 798 (C.A. 2) (motion under 28 U.S.C. 144); see *In re Union Leader Corp.*, 292 F. 2d 381, 391 (C.A. 1), certiorari denied, 368 U.S. 927. The fact that Judge Wilson chose to deny for the record the scurrilous allegations of Marie Monday did not show an improper bias or predetermination by him of the issues on the motion for a new trial. See *Cole* v. *Loew's Inc.*, 76 F. Supp. 872, 877–878 (S.D. Cal.). The judge was not a material witness with respect to the allegations forming the basis of the new trial motion which related only to the marshals and the jurors.

2. The motion for a new trial on the basis of newly discovered evidence was clearly dilatory. The affidavits of O'Brien and Hoffa (*supra*, pp. 5–6) show that petitioners sent investigators to inquire into misconduct by jurors and marshals within a week after the return of the verdict. The first motion for a new trial contained affidavits of bellboys at the Read House Hotel

relating to drinking and improper discussion of the case by jurors and marshals. While the present similar motion contains the affidavits of four prostitutes (but see note 5, *supra*) who did not furnish affidavits in connection with the first motion, the affidavits of the bellboys, who had provided affidavits for the first motion, make it clear that the prostitutes were known to them at the time of the original defense investigation (see *e.g.*, Culpepper, App. 36a). In addition, as the affidavit of the Read House Hotel porter Ervons shows (*supra*, p. 4), the subject of call girls was brought up during the first motion. As the court of appeals held (Pet. App. A, 13):

> With these leads available, no plausible explanation was given as to why [petitioners] should not then have been able to secure from the prostitutes the same information which [they] obtained nearly eighteen months later.[9]

The asserted claim that the evidence was not earlier discovered because persons were "fearful" of talking (App. 50a) is unconvincing in the circumstances. The present affidavits, containing more reckless and scandalous charges than the earlier ones, hardly evince fear.

Diligence was also lacking with respect to the alleged evidence that jurors Starnes and Kilgore harbored bias against unions and petitioner Hoffa, which they concealed on the *voir dire*. It is apparent

[9] The court below also noted that if such flagrant misconduct as is now alleged actually occurred, it must have been notorious among the affiants whom petitioners produced in support of their first motion (Pet. App. A, 13).

from the face of the affidavits (*e.g.*, "Everyone I talked to was real surprised that Doug was taken on the jury" (App. 42a)) that the purported evidence cannot be deemed to be evidence which could not have been discovered before or during the trial by Hoffa's resourceful investigators. If such bias was so notorious then, it would have been available to the defense at that time. Indeed, prior to the *voir dire*, counsel for petitioner Campbell stated that petitioners would check with the neighbors of the jurors on the panel to see if they had ever evidenced any bias, hatred or ill will toward petitioners (X App. 455a).

3. In any event, in view of the full record before the district court there was no error in his denying the motion without a hearing. *United States* v. *Johnson*, 327 U.S. 106[10]; *United States* v. *Astore*, 309 F. 2d

[10] Petitioners attempt to distinguish *Johnson* on the ground that there the trial court had observed the testimony of the witness who was alleged to have perjured himself. In this regard, however, there is no distinction between *Johnson* and petitioners' only new allegation contained in the present motion—that jurors Starnes and Kilgore had stated prior to trial that Hoffa should be convicted. Judge Wilson, who was also the trial judge, had observed jurors Starnes and Kilgore, during the *voir dire*, swear that they were not prejudiced and that they could render a fair and impartial verdict. Thus, as in *Johnson*, the judge passing on the motion could rely on his own observation of what occurred during the trial in determining that there was no merit to the allegations contained in the new trial motion. In addition, the judge throughout the trial had ample opportunity to observe the conduct of the jurors and their demeanor as they listened to testimony and delivered their verdict. There seems to be no reason why the judge should not be allowed to consider these personal observations in determining whether there is substance to allegations that the jurors were participating in wild parties and engaging in other improper conduct while the trial was in progress.

144 (C.A. 2); *Stern* v. *United States,* 260 F. 2d 365 (C.A. 6); *Blodgett* v. *United States,* 161 F. 2d 47 (C.A. 8). Here no trial witness has recanted; there is no claim that the government's trial testimony was false. Unlike the situation in the cases cited by petitioners (Pet. 15), there has been no concession of impropriety by any marshal or juror. Ranged against the affidavits of the four prostitutes and the co-employees of Starnes and Kilgore (as well as the "affidavits of two procurers for prostitutes who do not purport to identify any puror as having engaged in any misconduct" (Pet. App. D, 51)) were the affidavits of all the available jurors [11] and marshals involved, which categorically denied any improper conduct. The court also had before it the government's affidavits—to date unchallenged—on the first motion for a new trial, to the effect that money was promised certain of the bellboys at the Read House Hotel in return for their affidavits and the unrefuted affidavit of Mrs. Akers (a juror) showing that she was not even in the city where her alleged conversation admitting improper jury discussion took place (see *supra,* p. 4). The assertions of fellow employees of jurors Starnes and Kilgore also suggest contrivance since juror Kilgore was invited to a party by one of petitioners' affiants (Isenhower) after Isenhower had made an affidavit allegedly reporting admissions by Kilgore of misconduct on the jury (see Pet. App. D, 51–52).

In the light of petitioners lack of diligence in bringing this motion and in the face of all the evidence

[11] The one juror who did not supply an affidavit was critically ill (Pet. App. A, 47).

of contrivance a hearing was not required to test the truthfulness of petitioners' allegations which had been unequivocally denied in affidavits by the jurors and marshals charged with the misconduct. As the majority below pointed out (Pet. App. A, 19), "[t]here is the countervailing consideration [in this case] of protecting the jurors from inquisition, harassment and * * * embarrassment in a hearing."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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